AMERICAN BAR ASSOCIATION

JOVRNAL

JANUARY, 1925

VOL. XI Price: Per Copy, 25c; Per Year, $3; To Members, $1.50 No. 1
Published Monthly by The American Bar Association at 1612 First National Bank Building, 38 South Dearborn Street, Chicago, Illinois
Entered as second class matter Aug. 25, 1930, at the Post Office at Chicago, Ill., under the Act of Aug. 24, 1912.

We Thank

the Pennsylvania Grade Crude Oil Association which put this advertisement in the *Saturday Evening Post.*

Look at

the slight cost of insurance! And then consider the relative unimportance of the other items.

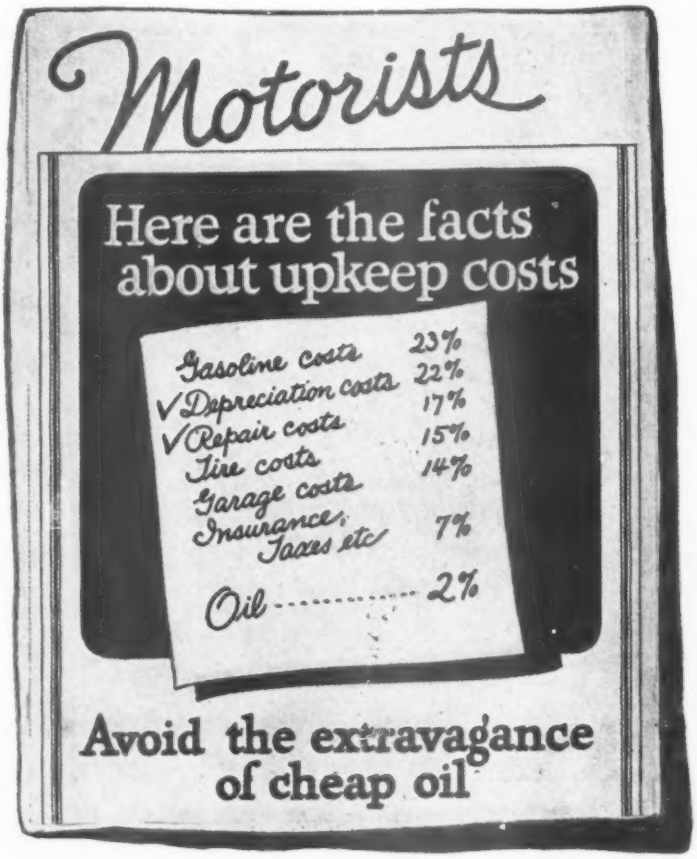
GAS 23%—Well, if there is no gas, the most that can happen is that you stand still.

DEPRECIATION 22%—Yes, a car shows signs of age in five years, but still it may be running.

REPAIRS 17%—Even without them, the most you can lose is the use of the car.

TIRES 15%—Without rubber riding might be bumpy!

GARAGE 14%—Unprotected, the shine would undoubtedly wear off.



BUT INSURANCE (less than 7%)! Without insurance you might lose not only the car, but the garage, the home, and everything you have in the bank! It's a fact!

Life would be Bumpy, Then!

THE TRAVELERS INSURANCE COMPANY
Hartford

THE TRAVELERS INDEMNITY COMPANY
Connecticut

THE TRAVELERS

ACCIDENT, LIFE, LIABILITY, HEALTH, AUTOMOBILE, STEAM BOILER, COMPENSATION, GROUP, BURGLARY, PLATE GLASS, AIRCRAFT, MACHINERY

TABLE OF CONTENTS

AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. XI JANUARY, 1925 NO. 1

Next Annual Meeting at Detroit September 2-4

DETROIT was selected as the place for holding the next annual meeting of the American Bar Association, by the Executive Committee at the meeting held on Jan. 12 and 13 at Atlanta. September 2, 3 and 4 are the dates fixed for it. Invitations were presented from St. Louis and Providence, R. I., but the Michigan city presented arguments which proved decisive with the committee. Among other important things done at the Atlanta meeting was the decision to publish a volume in commemoration of the visit of the American Bar Association to England last summer, and to make the volume, both from an artistic and literary standpoint, a fitting memorial of the unique and important event. Requests for appropriations from the various committees were heard and acted on and the customary routine business transacted.

Mr. Horace Kent Tenney, of Chicago, was elected Associate Editor of the American Bar Association Journal to fill the vacancy caused by the resignation from the Board of Mr. Edgar A. Bancroft, now ambassador to Japan. In this connection it is of interest to state that Mr. Tenney is one of the leaders of the Bar of Illinois, and has had a long and varied experience in the practice. He has been president of the Chicago Bar Association, the Illinois State Bar Association, and the Law Club of Chicago. He was educated at the Universities of Vermont and Wisconsin, receiving his legal training at the latter institution, and began the practice in Chicago in 1881 as a member of his father's firm, at that time one of the leading ones in this section. He was professor of Law at the University of Chicago, 1903-11. He is now a member of Tenney, Harding, Sherman and Rogers.

The Bar of Atlanta gave the officers of the Association a fine example of southern hospitality, and the visitors greatly enjoyed their brief stay in the southern city. The principal social event was the banquet at the Piedmont Driving Club, at which President Charles E. Hughes of the Association delivered the principal address. He spoke of the work of the Association to maintain standards of admission to, and practice at, the Bar on a high level, and to foster "the law-abiding sentiment throughout the land, the disposition to be reasonable, to be fair, to settle things according to available standards of justice, to enforce the conceptions of justice against the demands of brute force." In beginning his remarks he referred sympathetically to the unfortunate death at the Driving Club on the very evening of the banquet, of Alex W. Smith, a leader of the Atlanta Bar, who was suddenly and fatally stricken with apoplexy. President Hughes was introduced by Hon. Grover Middlebrooks, President of the Atlanta Bar Association, and after the latter's address, Judge Peter W. Meldrim of Savannah, Ga., a former president of the American Bar Association, was introduced as toastmaster. He called on several prominent members of the Bar for speeches, including Judge Richard B. Russell, Chief Justice of the Georgia Supreme Court, Hon. Chester I. Long of Kansas, and Judge Nash Broyles of the Georgia Court of Appeals. The banquet was attended by more than three hundred guests.

The Executive Committee on adjourning passed the following resolutions expressing appreciation of the cordiality of their reception at Atlanta:

"The Executive Committee of the American Bar Association hereby expresses its appreciation of the courtesy and hospitality extended to it by the Atlanta Bar Association on the occasion of its

midwinter meeting Jan. 12-13, 1925. The accommodations prepared for our reception were adequate and convenient, the dinner so graciously tendered was delectable and, best of all, you met us in a spirit of sincere friendliness which would have made us happy in a less perfect environment. To each member of your association, to your charming ladies and to all those of your bench and bar who helped to make the occasion delightful and memorable we acknowledge ourselves deeply indebted.

By direction of the Executive Committee:

CHARLES E. HUGHES, President.
WILLIAM C. COLEMAN, Sec'y."

Association of Law Schools Meets

THE Twenty-second Annual meeting of the Association of American Law Schools was held at the La Salle Hotel, Chicago, December 29-31, 1924. Nearly sixty member schools were represented and over two hundred individuals were in attendance.

Perhaps the most noteworthy event of the meeting was the election to membership for the first time of schools conducting part-time curricula. At the meeting of the Association two years earlier provision had been made for the membership of part-time schools, it being provided, however, "that a part-time school shall require for the first degree in law a course of resident study that, in the opinion of the Executive Committee, is equivalent to the requirements for a full-time school." At the recent meeting, pursuant to the recommendation of the Executive Committee, three schools, namely, those of De Paul University, Loyola University (of Chicago) and St. Louis University, all conducting part-time curricula in addition to their full-time schools, were elected to membership. A year earlier two member schools, namely, the Law Schools of the University of Southern California and George Washington University, conducting part-time courses, were approved. The three schools elected to membership have instituted in their part-time courses curricula running forty weeks per year for four years.

Another high spot in the meeting of the Association was the address given by Hon. George W. Wickersham of New York. After pointing out the many ways in which the law teacher has been found to be of great value in the improvement of the law generally, the speaker appealed for the cooperation of the skilled law school men in formulating a restatement of International Law, a field in which the speaker has found a profound interest. A committee representing the Association was appointed to consider the undertaking of this task.

The address of the president, William Draper Lewis, also emphasized the opportunities for cooperation between the three branches of the legal profession—the bench, the bar, and the law teachers—in the improvement of the law and its administration.

The following officers were elected for the ensuing year: President, O. K. McMurray of the University of California; Secretary-Treasurer, Ralph W. Aigler of the University of Michigan; the Executive Committee, the President and Secretary ex-officio, Everett Fraser of the University of Minnesota, Thomas W. Swan of Yale University, and William Draper Lewis of the University of Pennsylvania.

Agenda for Meeting of Commerce Committee

WE have received the following notice from the Chairman of the Committee on Commerce, Trade and Commercial Law relative to the hearings to be conducted in New York City:

The Committee on Commerce, Trade and Commercial Law of the American Bar Association will hold a public meeting in the Chamber of Commerce Building, 65 Liberty Street, New York City, Tuesday, Wednesday and Thursday, March 17, 18 and 19, 1925, for discussion and recommendation by all persons interested in the subjects appearing upon the agenda or that may be appropriately added thereto.

The Committee cordially invites all persons interested in any of the subjects mentioned to meet with the Committee at the time stated for their consideration, and those unable to attend in person are requested to submit written suggestions. Sessions of the meeting will open promptly at 10 A. M.

TENTATIVE AGENDA

Tuesday, March 17, 1925

10 A. M.

1. Suggestions of
   (a) New Business
   (b) Other subjects.

11 A. M.

1. Bankruptcy
   (a) Resolution of the 1924 report by the Committee declaring the administration of bankruptcy estates a governmental function and favoring administration thereof by official receivers.
   (b) Amendments to the Bankruptcy Act.
   (c) Amendments to the Rules of Procedure in Bankruptcy.

2 P. M.

1. Industrial Court Act for the United States.

Wednesday, March 18, 1925

10 A. M.

1. Rules of the Road Act on Federal highways receiving Federal aid and on highways over which the U. S. mails are carried, in the interest of reducing automobile accidents and of securing unity of rules of the road for governing the use of highways by motorists in states other than their residence.
   (a) Speed regulations
   (b) Marking of Highways
   (c) Uniformity of Police Traffic Tower Signals and Regulations in Various Cities.
   (d) Regulations Covering Signalling by Drivers for Stops, Turns, etc.
   (e) Brake Requirements
   (f) License Tags and Mountings
   (g) Headlamp and Lens Regulations
   (h) Windshield Deflector to Prevent Blinding of Operator by Headlights, Spotlights, etc.
   (i) Use of Stop Lights
   (j) Tail Lamp Specifications
   (k) Rear View Mirrors
   (l) Marking Main Crossings and Railroad Crossings and Day and Night Warning Signals for Same.
   (m) Parking and Parking Signs.

Thursday, March 19, 1925

10 A. M.

1. Senate Bill 1005, U. S. Arbitration Act.
2. Senate Bill 1006, U. S. Sales Act.
3. Senate Bill 2915, Amendments to Pomerene Bills of Lading Act.

11 A. M.

Executive Session.

W. H. H. PIATT, Chairman.

ADAPTATION OF THE LAW TO CHANGING ECONOMIC CONDITIONS

Two Classes of Problems That Present Themselves in Effort to Secure Such Expression of Municipal Law as Will Promote Human Progress—Legislative and Judicial Processes By Which Municipal Law Is Made—Need for Better Public Understanding of Functions of Courts—How to Get Qualified Judges*

By William Draper Lewis
Director of the American Law Institute

As stated, the title of this paper is "The Adaptation of the Law to Changing Economic Conditions". I am by no means sure that I know exactly what is meant by the expression. As I employ it this evening it denotes the process of adjusting our municipal law to the needs of human progress.

Of course, if we interpret the words "adaptation to changing economic conditions" literally, the whole phrase becomes nonsense. The social and economic conditions affecting any one of us—that is, the sum of the situations that exist because we are not alone in the world—may be very bad. They certainly are bad from the point of view of the man who is in jail. On the other hand, from the point of view of most of the members of a particular economic class or group, this may be the best of possible worlds. Other classes or groups may have serious doubts about the correctness of this proposition. I suppose no sane man, who is not a politician affiliated with the party in power on the eve of an election, would assert that all existing social and economic conditions were good. We may not all of us have a "Divine discontent" with the things that are wrong; but a walk through this or any other city, unless, perchance, we confine ourselves to its Michigan or Fifth Avenues, will convince anyone who cares to think about the matter at all that this is not a world in which man has ordered all things well—not even the fundamental things. Why then should law be adjusted to economic conditions? Should not rather economic conditions be adjusted to law? Should not law be the expression of justice? Is there no such thing as perfect justice, immutable, unchangeable, the same yesterday, today and tomorrow? I do not know; but I do know that human experience is always teaching and re-teaching us that the law of the courts and the legislatures, the municipal law, the law which the executive and judicial officers of the government administer, should be adjusted, not necessarily to economic conditions, be these conditions good or bad, not necessarily to the needs of human progress, but rather to the community's felt sense of justice. The law which does not accord with the preponderating felt sense of justice is an evil thing. If enforced, it is a manifestation of tyranny; unenforced, it weakens that sense of obligation to the social will, as expressed in municipal law, on which public order and individual liberty so largely depend.

Take for instance the way in which we should deal with criminals. It may be that a person who commits any one of a large number of acts, like murder, robbery, forgery, embezzlement, should be sentenced to a hospital for criminals until cured of an undue propensity to commit crime. But as long as the preponderating sense of justice in the community is that crime should be punished and that the amount of punishment should bear some relation to the community's view of the character of the crime, the municipal law cannot and should not adopt a system of dealing with persons convicted of criminal offenses which omits punishment graded according to the nature of the offense as an element of criminal justice.

If then we interpret the expression "adaptation of law to changing economic conditions" as meaning such an expression of municipal law as will tend to promote human progress, the fulfillment of the desire to promote such an adjustment presents two classes of problems:

1. How may the community's felt sense of justice be developed so as to become better adjusted to the needs of human progress?
2. How may our municipal law be better adjusted to the preponderating sense of justice in the community?

From the very nature of these problems, there is no complete solution. To say this is probably only another way of saying that municipal law can never be the expression of perfect justice. There will always be a gap between what man believes to be right and what at the time is essential to the upward progress of the race; there will always be another gap between municipal law and man's felt sense of justice. The task of each generation is to make these gaps as narrow as possible. If they become too wide, human progress is impossible.

I am not personally fitted to discuss before such an audience as this the changes in our felt sense of justice and, consequently, the changes in our municipal law which should be made to bring a closer correspondence between law and human needs. Many of you here are spending your lives in the study of one or another of the many phases of that problem. And yet there are certain things touching the better adjustment of law to the needs of life, on which a lawyer, who though years ago he forfeited the right to continue to call himself an economist, may perhaps make a few suggestions.

In the United States today there are two processes by which our municipal law is made—the legislative process, and the judicial process. The first gives us our statutory law, the second our common law.

At any one time a better adjustment of municipal law to the needs of progress is to a considerable extent dependent on the degree and extent of the common knowledge of the operation of the machinery by which that law is developed and expressed. In a republic or democracy such knowledge should be widespread. I often wonder at the ignorance concerning a large part

*Address before the Association for Labor Legislation and the American Economic Association at meeting in Chicago, December, 1924.

of the machinery for developing law in the United States exhibited even by persons actively interested in the improvement of the law. It is true that the part which our state legislatures and Congress play in the making of new law is well known. Furthermore, there is a very wide knowledge of the way in which legislation is formulated and enacted, and those interested in changing the statutory law or preventing change have, especially since the World War, acquired an almost uncanny mastery of the dangerous art of propaganda. But, on the other hand, it is no exaggeration to say that ninety-nine persons out of a hundred are ignorant of the part the courts play in expressing and developing law. The American Law Institute, for instance, was founded in 1923 at a notable gathering of members of the legal profession. Its chief object, as announced at the time, is to restate the law with a view to its simplification and clarification. The Restatement will have little to do with the statutory law. The Institute is not a legislature and could not restate the statutory law even if it desired to do so. Yet, as its Director, immediately after its formation, I was in receipt of two or three hundred editorials and many letters from educated laymen commenting with enthusiasm on the prospect of a clarification and simplification of our congressional and state statutes. "Law" to the newspaper editors and my correspondents meant "statutory law" and nothing else. They were, and in spite of my efforts I think still are, entirely oblivious of the fact that a great part of the law is not statutory law, that the law usually designated as "common law" has been developed and is now being expressed and developed by the courts.

There are several reasons for their ignorance. Chief among them is the way in which we are taught as children about the separation in America of the legislative, executive and judicial branches of government; the function of the first being to make, of the second to execute, and of the third to interpret law. This instruction, often repeated, naturally leaves on the mind the impression that the law, which the executive enforces and the court interprets, is a thing which the legislative branch of the government has an exclusive monopoly to manufacture. Indeed, the formula about the separation of the three departments of government, like other half-truths or two-thirds-truths, is responsible, not only for this, but for several other misconceptions concerning our fundamental institutions.

Another reason for the general failure to recognize the part played by the courts in making the law is the way in which a court operates. A case is presented for decision. The question to which the judge addresses his mind is: What, according to the law, should be the judgment? not: What change should I make in the law in order to do justice? The assumption is that there are rules of law which will decide the case and that the judge's task is not to invent these rules, but to seek them out and apply them. Furthermore in one sense the assumption is true. For several centuries after the establishment of the Kings Courts in England, the judges, as they went from shire to shire or sat at Westminster, decided cases mainly in accordance with what they believed to be right and in accord with Norman or English custom. But for several centuries the recorded decisions have been growing more and more numerous; the net result being that today there is a great body of principles and rules based on these decisions called the common law, and it is these principles and rules, hammered out on the anvil of experience, which the judge endeavors to apply to the case before the court.

Yet, in spite of the thousands of recorded decisions, every year many cases arise which are cases of first impressions, cases essentially different from any previously recorded case, and to decide which the judge has to turn to his own felt sense of justice. Again, no matter how frequently a principle of law may be established by prior decisions in analogous cases, if under the particular facts of the case before the court, a manifest injustice would be done by applying the principle, the judge has always the power, and not infrequently the instinct, to apply his own felt sense of justice by announcing an exception to the principle.

Thus the courts make law, but they do so by a totally different process from legislatures.

The judicial process of making law not only exists as a fact but is as necessary as the legislative process, if our municipal law is to reach an approximate adjustment to changing economic conditions.

Indeed, if we are to test the excellence of municipal law by the degree of its approximation to the needs of human progress, even a cursory examination will show that there is much to be said in favor of awarding the prize to the law of the judges rather than to the law of the legislatures. To take only a few instances. Practically our entire law of Contracts is judge-made. Yet from the point of view of its adaptation to the needs of life, it is far better law than our law of crimes which, as it exists today, has been the subject of much statutory enactment. Again, although many doubt the wisdom of the more recent expansion in America of the process of injunction to industrial disputes between large economic groups, taken as a whole perhaps the most perfect part of our law is our system of equitable remedies. This system is wholly judge-made. True there have been notable failures on the part of the courts which have had to be remedied by legislation, as the failure of the judges to adapt the law applicable to the injury of an employee by a fellow employee to modern industrial conditions—a failure which made necessary our Workmen's Compensation Acts. Again, it is probable that our whole law of negligence, which is judge-made law, needs radical revision. But against these whole or partial failures, we may place the steady development of most of our law of torts to meet the new needs of a changing world.

Finally, if we turn to history, we find periods covering the life of a whole generation marked by little or no useful advance in legislation in which the courts developed principles and rules of lasting value. The first thirty years of the nineteenth century did not produce much legislation either of permanent or temporary worth, yet during those years Lord Eldon in the English Court of Chancery probably made more useful private law than any other man of modern times, and John Marshall, as Chief Justice of our Supreme Court, laid down the fundamental principles of our constitutional law.

As a maker of the common law, the American judge is performing a function performed for hundreds of years by the English judge. Written constitutions coupled with the practice in our courts of disregarding legislative acts which the courts consider as contrary to the Constitution create a condition which is found only in the United States. In it we have another important source of judicial power to mould and express

our law, in this case in the field of public as distinguished from private law.

While the knowledge of the existence of this power is, of course, general, there is a surprising lack of any attempt to analyze the differences in the various types of constitutional provisions and to grasp the difference in the functions exercised by the courts in dealing with the different types. The general absence of any real thought on the subject is responsible for what only can be described as the recent stupid attempts to modify the power of the Supreme Court to declare invalid legislative enactments which they regard as contrary to the Constitution. I say "stupid" because hardly any conceivable object of the proponents could be advanced by the adoption of their propositions.

One class of constitutional provisions confers power on the Federal Government and also in effect reserves other powers to the States. From time to time disputes arise as to the respective extent of these powers. The final determination of these disputes, if not left to negotiation and compromise, must be vested in some body. Under the leadership of Chief Justice Marshall, the Supreme Court of the United States, by disregarding an Act of Congress or a State statute which the judges believed contrary to the Constitution, became the final arbiter of all questions involving the respective powers under the Constitution of the State and Federal Government. No other body has a prospect of functioning so well. To permit each state to determine the extent of its own powers would reduce the national government to impotency; to permit Congress to be the sovereign judge of its powers, as some suggest, would tend to leave the constitutional rights of the states at the mercy of a temporary majority or a body moved by political motives.

Occasionally the United States Supreme Court does deliver a decision in which the nine judges will divide five to four. The decision holding unconstitutional the first Congressional Child Labor Act, which prohibited the interstate transfer of goods into which the labor of children under certain designated conditions entered, was a five to four decision. Personally I regret the decision, but as a lawyer I realize that the five to four decision registers a fact—that the arguments for and against the constitutionality were almost equally balanced. Because there are numerous questions of this character, many constitutional decisions must be made by a divided court; but such decisions are and should be just as conclusive as one concurred in by all the members of the court, unless indeed we wish any doubtful exercise of power on the part of Congress or any one of the States to remain indefinitely a political question.

While the function of final arbiter of the limitations of Federal and State power places the Supreme Court in a position of unique importance, the range of possible decisions of the Court is confined within the provisions of the Constitution conferring on the Federal Government, or withholding from the States, definite power. In order to emphasize the matter to which I wish to draw your attention presently, I want you to note that, as expressed in the Constitution, these powers are specific and not general powers. Except in the grant of power to the Federal Government to make treaties, there is no general grant of power in the Constitution. There are, for instance, no such provisions as "The Congress shall have power to promote the public welfare" or "The Congress shall have the power to protect national interests"; thus while the terms in which the specific powers are described, as the power over interstate commerce, leave considerable latitude to the interpreting tribunal, the court is not given the opportunity to develop a general system of national power.

When we turn to another type of constitutional provisions, those which protect individual rights, we again find that in all but two instances these rights are likewise described in specific terms. As stated, however, there are two exceptions. The Fifth Amendment and the Fourteenth Amendment state that the Federal Government and the States respectively shall not deprive any person "of his life, liberty or property without due process of law". There are several possible meanings which could be given to the provision but the Supreme Court has, at least ever since the adoption of the Fourteenth Amendment, regarded the provision in each Amendment as the announcement of a general principle binding on the legislative as well as on the executive branch of government, to the effect that the individual shall be free from being deprived of his life, liberty or property, not only by unauthorized executive action or by statutes which establish arbitrary and unfair legal process in the prosecution of civil and criminal cases, but also by any statute the terms of which are arbitrary and unfair according to those ideas of individual liberty and personal rights which have been developed by the English speaking people.

In other words, in these "due process of law" clauses of the Constitution, as interpreted by the Court, we have not a specific but a general clause protective of fundamental individual rights.

From the moment, therefore, that this view of the meaning of the expression "due process of law" was adopted by the Court—and I have little doubt that it was the meaning intended to be given to the words in the Fourteenth Amendment when that Amendment was ratified—the Court began to develop, by the same process as it develops the rules of common law, that is by a process of proceeding from precedent to precedent, a body of principles and rules which set forth what is and what is not taking life, liberty or property without due process of law. Thus since the Civil War beside our written constitution there has developed a body of more or less specific judge-made rules protecting the more important individual rights from governmental interference, and the American judge is not only exercising the power of every English speaking judge to develop common law, but he is, mainly by the decisions of the Supreme Court, also exercising the right to develop a constitutional common law system of limitations on governmental conduct.

It does not require either explanation or argument to show the enormous significance of this power or the profound, increasing effect it is having, and is bound to have, on the development of the law. From the revolution of 1688 down to the adoption of the Fourteenth Amendment in 1868 the whole trend of the development of the public institutions of England and America was to exalt the legislative branch of the government. But since the adoption of that Amendment the courts have made the due process of law clauses in the Constitution the starting point of a new institution which places probably increasing limitations on legislative power.

It is not my purpose here to discuss the wisdom of vesting in the courts this new and far-reaching power. I believe that the answer to any such question lies in the way in which the courts exercise it. I may, however, in passing be permitted to point out that the

Supreme Court so far has used its power, on the whole, most beneficially, and also in a manner satisfactory to the great majority of the American people. There is no prospect today of our adopting an amendment to the Constitution abolishing the due process of law clauses in the Constitution, and I, for one, have no desire to advocate any such action. But I do wish to impress upon you the significance of the power which we have given to the judge to develop and mould a body of principles and rules setting limits to legislative action, and to point out that, as the judges have this power in addition to their control of the vast body of the Common Law, it is all the more important that those of you who are interested in the improvement of the law—in bringing about a correspondence between municipal law and the needs of human progress—should do some hard thinking on how to secure judges capable of performing well their great responsibilities.

How may this be done? My personal observation is that those who complain most of our judges being out of touch with modern thought, and inclined to block useful legislation by holding it unconstitutional, are apt to be attracted by propositions for a judiciary elected for short terms by the people. Such propositions, I submit, do not evidence any very "hard thinking" on the problem of improving our governmental machinery. A method better calculated, not to change intelligently our present system, but leaving it unchanged, to destroy whatever good there is in it, cannot well be imagined.

It is, perhaps, not unnatural to conclude that if the American judge is a vitally important factor in the making of law, then the electorate should keep control of the bench, that judges should be elected for short terms, and that the provisions of the Federal Constitution which make the Federal Judges appointive for life should be changed. If, however, what we are desirous of producing is a judiciary capable of moulding our Common Law to the needs of life and also capable of the still more difficult task of developing the law pertaining to the limitations of the power of government over life, liberty and property, in a way at once to protect the individual and to leave in the government the power to act efficiently for the public welfare, then our chief concern should be to create conditions which will insure, as far as possible, the selection of judges who have a mastery of the law and some comprehension of the social movements and the trends of human thought and desire.

If there is any economist here who believes that to make the judiciary responsible to the popular will is the way to make judge-made law correspond to the needs of human progress, then I recommend to him that he read some of the more important decisions of the Supreme Court of the United States and of the highest courts of our States, and that he follow by an inquiry into the legal reputations of the judges whose decisions interest him because they show an insight into the needs of life. I am much mistaken if, having done this, he will not be convinced that a system which makes the exercise of the judicial function a temporary rather than a life occupation, and a place on the bench the reward of a successful contest at the polls, is not a system likely to give us judges capable of performing satisfactorily the task of doing justice and expressing and developing private and public law; he will find that judges who make decisions justly criticisable as showing a lack of an appreciation of modern conditions are rarely men who have the reputation of being great lawyers with the background of a broad general education.

You ask how we may secure qualified judges? I need not point out that there is no process which will insure good results in every case. The first and perhaps the most essential thing is to readjust our own ideas of our institutions—of the functions performed by the judiciary beyond, though not apart from, the settlement of the rights of parties engaged in litigation.

The second essential is to disabuse the public mind of the pernicious fallacy that the electorate should have an opportunity at frequent intervals to change their judges. It may be that in America we are throwing too much responsibility on the courts over things vital to our progress as a nation. If so, cut down the power. Return, if we will, to the English system. But do not make rules for the selection of judges that operate to prevent the efficient exercise of all judicial power. Realize that, however wide or however narrow the power of the courts, any power they have, by the very conditions under which it must be exercised, requires for its efficient working that the judge shalll have a thorough knowledge of the law and a broad general education. Realize also that the work of the judge should be a life work, not a temporary respite from the very different work of the practitioner.

The third essential is a much more general appreciation than now exists of the public importance of the requirements for admission to the bar. The judges are selected from the members of the legal profession. The profession of the law is a public profession. It should be open to all citizens who satisfy requirements sufficiently stringent to reasonably assure efficient performance of legal services. A well educated, efficient bar means a well educated, efficient bench. Today the great majority of those coming to the bar obtain their legal education in law schools. The American Bar Association some three years ago laid down what may be called minimum standards for law schools and for admission to the practice of law. The principal law schools of the country are considerably in advance of these standards, even of the one which prescribes that at least two years of college work shall be requisite for admission. I mention these things to show you that the better part of the legal profession is awakening to the public menace of an uneducated bar. The movement begun by the American Bar Association deserves, and is I think beginning to receive, the same support from the public that has made possible the great improvements in medical education, and consequently in medical science, which have taken place in the past twenty years. In regard to the education of the bar and, therefore, of the judges, the public need not I think fear that the poorer types of commercial law schools will long survive. Neither do I think need they fear that the law schools of our universities will not give their students a knowledge of the law and a training in the processes of legal reasoning. But in view of the part which the judiciary—and indirectly the practising lawyer pleading his case—play as makers of law, and especially in view of the power of the American judge to express and develop those constitutional common law principles limiting governmental interference with individual rights, the public should insist that our law schools should graduate men who are something more than well trained legal artisans; that the law school graduate should be a man who, besides his legal knowledge and training, has some knowledge of history, some knowledge of economic and social conditions, some

touch with the main intellectual currents of modern thought. The lawyer cannot be also an historian or an economist or an expert in industrial conditions. Good work in any of these fields requires undivided labor and devotion. But the thought-tight compartment into which we have shut off the law from the other social sciences has created a condition which makes the historian, the economist and the sociologist less efficient than he ought to be, and in addition presents a serious obstacle to the adequate performance of those judicial functions which, if well performed, tend more than any other thing to adjust our municipal law and our constitutional common law limitations on government to the needs of life.

The name of one of the organizations represented here tonight is the "American Association for Labor Legislation". I trust that nothing I have said will leave the members of that association with the impression that I believe intelligent labor legislation is not necessary. Persons often complain that too many acts are passed by Congress and the state legislatures. The number of acts is not a matter of importance. We always need more laws of the right kind and fewer of the kind that are not right. But I have failed in my purpose if I have not given you some idea of the important part played by the courts in the expression and development of law, and, furthermore, if I have not led you to at least consider whether, instead of attempts to make judges amenable to the popular will, by shortening their terms of office, or tinkering with the ordinary operation of the courts in constitutional cases, we will not more surely promote the adjustment of law to social and economic conditions by promoting those movements which will help secure judges who are not only trained lawyers but men whose legal training has been bottomed on a general education—an education which has given them some knowledge of the other fields of social science.

WORKMEN'S COMPENSATION LAWS AFFECTING INJURIES TO THE EYE

By HARRY BEST
Professor of Sociology, University of Kentucky

SOCIAL insurance is to have much in store for the handicapped classes, especially those of them whose affliction has befallen them adventitiously, or from some occurrence after birth. This will be notably the case with respect to the blind. With those who have been bereft of the great human faculty of sight, social insurance is not only the most desirable policy on general principles, but is really the only effective one left. All other systems of material aid for the sightless have been resorted to. Pensions, while as yet frequently necessary for persons who are not in the way of benefit by any form of social insurance, constitute on the whole a social policy objectionable on several different grounds, and are to be called into requisition only when all else has failed. Industrial employment by which the blind can earn their own support is of course the ideal scheme. Except as regards, however, a very limited number of capable, resourceful, and determined individuals, special industrial provision, including special industrial establishments, can hardly pay its way, or come near doing so; not a few blind persons are unfitted, physically, mentally, or temperamentally, for such work; and the practical difficulties, including those of a financial character, remain always very serious.

Social insurance, then, with the further superlative advantage of putting a premium on protection against injury, looms up as a great beneficent dispensation, to help solve the problem of the material treatment of the blind, so far as treatment of any kind may appear this side of their restoration to sight. In the United States social insurance has so far had introduction to any considerable extent only in one form, namely, workingmen's compensation laws, relating to injuries incurred from accidents in the course of one's industrial employment. Accidents are responsible for more injuries to the eye than any other single cause, over one-eighth, or including such external factors as exposure to heat, poison, and eye strain, over one-sixth, of all blindness being thus accounted for. It is to be noted at the same time that over two-thirds of all blindness occurs after the twentieth year of life, and that from the twentieth to the thirty-fifth accidents are far ahead of any other cause of blindness. To state the matter differently, one-tenth of all permanently disabling accidents involve the eye; of all accidents to the eye, one-twentieth result in its loss or permanent impairment. There are probably not less than three thousand cases of loss of an eye occasioned in industry each year in the United States, and probably not less than one hundred cases of total blindness.

Workingmen's compensation laws have now been joined definitely, and we may believe permanently, to the American legal code. Upon them there will be built up a body of judicial opinion and determination, which in time will become a distinct department of the adjudicated law. As yet, because of the recentness of the workingmen's compensation statutes, judicial decision as to them has not covered an extensive field; but this field is being rapidly extended. An examination of present decisions bearing upon the matter of the loss of sight, partial or total, may show us of what tenor are these decisions, and in what direction they are moving—which examination may be regarded likewise as a fair cross section of the general field of "accidents" within the purview of the workingmen's compensation laws, and of judicial opinion thereupon.

Possibly the largest part of the attention of the courts has been directed to the measuring or assessing of damages, or to the apportioning of awards, in given cases; and upon this matter various rulings, some of rather technical character, have been given. Where the statute has been silent on the subject, the loss of both eyes has readily been held to constitute total disability, to be compensated accordingly. There has likewise been a tendency to regard as actual blindness what

amounts practically to this, or the impairment of vision to a degree just short of absolute blindness. Thus in State v. District Court, a Minnesota case in 1916 (158 N. W., 700), where there had been a complete loss of sight in one eye and of 95 per cent in the other, it was held to be full blindness, even though the sight of the latter eye might with glasses be increased to one-third. This is the view accepted among workers for the blind generally today. Even though a man has technically a slight remnant of sight left, but too slight to be of practical benefit in the affairs of life, especially for the carrying on of industrial tasks, he is said as to all real intents and purposes to be blind.

By some courts, however, a stricter view is taken, especially where capacity to do some work remains, as in Nestle's Food Company v. Duckow, a Wisconsin case in 1922 (190 N. W., 434), where sight in one was reduced to 16/200, and in the other to 10/200, compensation not being allowed here for permanent total disability. Compensation for partial disability only was likewise allowed in Chebot v. State Industrial Accident Commission, an Oregon case in 1923 (212 Pac., 792), where there had been a total loss of sight in one eye, and half that in the other, the latter injury being a later result. A still stricter conception seems to be held when only one eye is involved. In Keyworth v. Atlantic Mills, a Rhode Island case in 1919 (108 Atl., 81), reduction of sight in one eye to one-tenth of normal vision, too little to be of any real benefit, was not considered the "entire and irrecoverable loss of sight in either eye", as demanded by the working of the statute.

A question that has caused difference of opinion is whether there has been a real loss of sight when with the use of eyeglasses sight is found to be but little diminished. In two cases in New York, Valentine v. Sherwood Metal Working Co., in 1919 (189 App. D., 410), and McNamara v. McHarg-Barton Co., in 1922 (200 App. D., 188), the negative view is taken, the injured person thus being denied compensation. In a New Jersey case, on the other hand, in 1922, Johannsen v. Union Iron Works (117 Atl., 639), the view is taken that while an artificial appliance may help, the injury is none the less positive. Says the Court in this case: Where one must depend upon some mechanism, braces or glasses, to enable a member of the body to function properly, and such necessity is the result of accident, such member is permanently impaired." (See also Butch v. Shaver, a Minnesota case in 1921, 184 N. W., 572.)

A somewhat similar technical question arises as to the effect of an injury to one eye which may be remedied to a greater or less extent by the use of eyeglasses, but at the cost of a lack of coördination with the good eye, or with the requiring of the complete closing of the good eye. Most of the decisions in such cases hold that the sufferer is entitled to full compensation as for the loss of an eye, as in Juergens Brosco v. Industrial Commission in Illinois in 1919 (125 N. E., 337) and Smith v. F. & B. Construction Co. in New York in 1918 (172 N. Y. Supp., 581). A contrary view is held in Frings v. Pierce Arrow Motor Company in New York in 1918 (169 N. Y. Supp., 309).

Should an operation offer promise in respect to an injury to the eye, and be attended with no further danger, it must be accepted, according to the rule in Joliet Motor Co. v. Industrial Board, an Illinois case in 1917 (280 Ill., 148). Should, however, according to the opinions of a number of industrial boards in their own decisions, there be no assurance of beneficial results, or should there be involved the possibility of other damage, full compensation may be directed without the election of such remedy. In the event that the extent of an injury cannot be known till some time in the future, the usual procedure is to make the award according to the apparent condition, with the understanding that it will be subject to future developments —a rule illustrated in two New Jersey cases, Feldman v. Braunstein in 1915 (87 N. J. L., 20) and International Motor Co. v. Purcell (103 Atl., 860).

In ascertaining the real loss suffered in injury to the eye or eyes, little difficulty is met where earning power is seriously or substantially affected, as in the Kansas case of Gorrell v. Battelle in 1914 (93 Kans., 370). In case, however, this should prove to be small, despite the infliction of the injury, there arise differences among the courts. Some hold that the injured person may insist upon his technical rights under the law, and accordingly receive compensation, as in the case in Michigan of Hirschkorn v. Fiege Desk Co. in 1915 (184 Mich., 239), Margenovitch v. Newport Mining Co. in 1920 (181 N. W., 994), and Stammers v. Banner Coal Co. in 1921 (183 N. W., 21), and in Winona Oil Co. v. Smithson in Oklahoma in 1922 (209 Pac., 398). Some courts, on the other hand, hold that, provided that the injured person can continue work largely as before, he is not entitled to compensation, it being his duty in the eyes of the law to reduce the extent of his injury as much as possible, as in Boscarino v. Carfagno & Dragonette in New York in 1917 (220 N. Y., 323) and Abbott v. Concord Ice Co. in New Hampshire in 1922 (116 Atl., 751). A compromise is sometimes effected, by which there is allowed one-half the difference between past and present earning power, as in Staley-Patrick Drilling Co. v. State Industrial Commission in Oklahoma in 1923 (212 Pac., 1006). This may be the case even though practical blindness has resulted, as in State v. District Court in Minnesota in 1919 (173 N. W., 857).

The courts are likewise divided as to the effect on the situation of, or the allowance to be made for, a previous injury or impairment of the sight, which may be regarded as having laid the foundation of the present disability, or as having been precipitated by it. Under the strict view, no compensation may be awarded if the previous affection is even remotely involved, or if the last accident would have in itself been insufficient to occasion the damage. Should the prior condition have already been very serious, very strong evidence will be required to show that the injury in question was the actual cause, this being especially the case if it appears that the complainant had been suffering from an eye malady or from some systemic disorder liable to have a pronounced influence. Such is the doctrine of Perry County Coal Corp. v. Industrial Commission in Illinois in 1920 (294 Ill., 1920), Pinto v. Chelsea Fibre Mills in New York in 1921 (186 N. Y. Supp., 748), Landau v. E. W. Bliss Co. in New York in 1921 (199 App. D., 145), and Keller v. Industrial Commission in Illinois in 1922 (302 Ill., 610). Under the more liberal attitude, compensation will be permitted whenever it appears clear that the accident is the proximate cause, or that it has aggravated or rendered incurable a previous trouble. This attitude has illustration in Estate of Beckwith v. Spooner in Michigan in 1914 (183 Mich., 333), Purchase v. Grand Rapids Refrigerator Co. in Michigan in 1916 (194 Mich., 103), Great Northern Ry. Co. v. King in Wisconsin in 1917 (165 Wis., 159), Duprey's Case in Massachusetts in 1914 (219 Mass., 189), Industrial Commission v. Johnson

in Colorado in 1918 (172 Pac., 422), and Rockford City Traction Co. v. Industrial Commission in Illinois in 1920 (295 Ill., 358).

A question of special concern is whether a person who happens already to be blind in one eye is, on the loss of the second, entitled to compensation as for total blindness—a matter of concern not only as a principle to apply generally in workingmen's compensation laws, but of very serious moment to the rather considerable number of persons in society who have but one eye to see with. The issue has bearing upon the possible attitude of the employer towards such persons in the event that the loss of the second eye is to be taken as amounting to total blindness, with no small consequences thus involved to their earning power.

On this question the courts are found to be in sharp disagreement. The view adopted in some courts is that an employee taken into service is accepted just as he is and for whatever work he is capable of, and that such an employee may therefore lay claim to the full benefits of the law if rendered totally disabled. This view is set forth clearly in the case of In re Branconnier in Massachusetts in 1916 (111 N. E., 792):

> The employee when he entered the service of the subscriber [the employer] had that degree of capacity which enabled him to do the work for which he was hired. That was his capacity. It was an impaired capacity as compared with the normal capacity of a healthy man in the possession of all his faculties. But nevertheless it was the employee's capacity. It enabled him to earn the wages which he received. He became an "employee" under the Act, and was thereby entitled to all the benefits conferred upon those coming within that description. The Act affords a fixed compensation for a limited time "while incapacity for the work resulting from the injury is total." It establishes no other standard. It fixes no method for dividing the effect of the injury and attributing a part of it to the employment and another to some preëxisting condition, and it gives no indication that the legislature intended any such division. The total capacity of this employee was not so great as it would have been if he had had two sound eyes. His total capacity was thus only a part of that in the normal man. But that capacity, which was all he had, has been transformed into a total incapacity by reason of this injury. That result has come to him entirely through the injury.

With this enlightened judgment, as we can not help calling it, other decisions are in accord. Sometimes a court points out that the law is of a remedial character, and consequently to be construed liberally. Thus in Combination Rubber Mfg. Co. v. Court of Common Pleas, a New Jersey case in 1921 (115 Atl., 138), it is declared: "The petitioner had eyesight when he entered on his employment. That eyesight was a physical function; it was destroyed utterly." Similarly in Calumet Foundry & Machine Co. v. Mroz, an Indiana case in 1922 (137 N. E., 627), it is stated with reference to the law: "Its humane and beneficent purpose should not be frustrated by technical, cold-hearted construction against the injured worker. It is the spirit of the Act that loss resulting from the injury should be borne by the industry in which it occurred, not by the injured employee, his dependents, or the public." In another case, Industrial Commission v. State Insurance Compensation Fund in Colorado in 1922 (203 Pac., 215), it is affirmed that the law does not require that the worker be physically perfect. Like views are held in In re J. & P. Coats in Rhode Island in 1918 (103 Atl., 833), Kriegbaum v. Buffalo Wire Works Co. in New York in 1918 (182 App. D., 448), Brooks v. Peerless Oil Co. in Louisiana in 1920 (83 So., 663), Fair v. Hartford Rubber Works in Connecticut in 1920 (111 Atl., 193), Guderion v. Sterling Sugar & Ry. Co. in Louisiana in 1922 (91 So., 546), and Heaps v. Industrial Commission in Illinois in 1922 (303 Ill., 443).

The contrary view is that when the employer forms the engagement with the employee, he, being aware of the condition of the latter, acts with due regard to his own liability, and hence may be held only for the last injury; or, in other words, that the final disability may be considered as due to separate accidents, with only the second of which the employer may be chargeable—such being especially the case where the statute expressly declares that an injury creating, in combination with a previous one, total disability, is to be regarded as but partial. Thus in Stevens v. Marion Machine Foundry & Supply Co., an Indiana case in 1921 (133 N. E., 23), it is declared: "It is inaccurate to say that the injury resulted in total blindness. The industrial injury plus the injury received in childhood resulted in total blindness." A further argument for this view, as held in Lente v. Lucci, a Pennsylvania case in 1922 (119 Atl., 132), is that if the opposite one is accepted, employers will become much less willing to employ persons blind in one eye, for fear of the consequences. A similar attitude is found in State v. District Court in Minnesota in 1915 (129 Minn., 156), Weaver v. Maxwell Motor Co. in Michigan in 1915 (186 Mich., 588), Blaes v. E. W. Bliss Co. in New York in 1917 (177 App. D., 370), and Collins v. Albert A. Albrecht Co. in Michigan in 1920 (180 N. W., 480.) In the case, on the other hand, of International Harvester Co. v. Industrial Commission in Wisconsin in 1914 (157 Wis., 167), an award for the impairment of sight in one eye, on the ground that employers might thereafter be unwilling to engage a man in such condition, was disallowed, it being held that there was no evidence to show this discrimination.

There may even be said to be a third doctrine as to the entire matter, which is in the nature of a compromise, though believed to involve substantial justice. According to it an equitable arrangement may be worked out by allowing compensation for permanent total disability less compensation for loss of one eye. Thus in Jennings v. Mason City Sewer Pipe Co., an Iowa case in 1919 (174 N. W., 785), on the loss of the second eye, the sight of the first being already gone, compensation was granted for four hundred weeks, as for permanent total disability, with a reduction of one hundred weeks, the schedule allowance for the loss of one eye.

It is pleasant to record that the first view, which is the broader and more generous one, is the view that is being more and more adopted of recent years. It is hardly doubtful that before long it will have become the prevailing conception. It seems to have in it the principles underlying the whole workingmen's compensation laws. It certainly presents the humane attitude towards the injured worker, and for that reason we believe it to be the correct attitude.

A matter of similar order, but of far less serious consequence, has to do with an injury which destroys the remainder of vision in an already imperfect eye. In Hobertes v. Columbia Shirt Co. in New York in 1919 (173 N. Y. Supp., 606), the loss of the remaining half of the sight in one eye is held to be total loss in that eye. Such is the view also as to a previously defective eye, in Pawling v. Harnischfeger in Wisconsin in 1919 (174 N. W., 455).

Of like import with the effects of a subsequent injury to an employee already blind in one eye are the results to an employee in such condition or suffering from defective sight when he meets a new accident not involving the eye. Here the view is taken that full

allowance is to be made for the second injury, even though the latter injury could have been avoided if there had been complete vision in both eyes. This opinion is illustrated in two cases—Peru Basket Co. v. Kuntz in Indiana in 1919 (122 N. E., 349) and Chicago Journal Co. v. Industrial Commission in Illinois in 1922 (305 Ill., 46). The rule here may be said to be in line with the general theory of the courts that persons without sight may in general assume that public ways or sidewalks are safe for travel, and may have redress for injuries incurred thereon, even though they would have escaped injury if they had been in the possession of sight.

Another issue arises in respect to the impairment of vision subsequently to the accident that was the original cause, other causes having been set in operation to affect it. If it appears that the consequences have a direct connection with the primary trouble, are definite, and are not too remote, an award will be directed, as in Hunnewell's Case in Massachusetts in 1915 (220 Mass., 351), In re Sponatski in Massachusetts in 1915 (220 Mass., 526), Riley v. Mason Motor Co., in Michigan in 1917 (165 N. W., 745), Cline v. Studebaker Corp. in Michigan in 1915 (189 N. W., 514), and Indiana Power and Water Co. v. Miller in Indiana in 1920 (127 N. E., 837). If these conditions are not attendant, an award will not be directed, as in McCoy v. Michigan Screw Co. in Michigan in 1914 (180 Mich., 454), Voelz v. Industrial Commission in Wisconsin in 1915 (161 Wis., 240), Borgsted v. Shults Bread Co. in New York in 1917 (180 App. D., 229), State v. District Court in Minnesota in 1919 (173 N. W., 857). Akin to this is the consideration of the element of time involved when the results of an injury do not fully manifest themselves till a later period. Here a generally liberal view is taken; and time is held to relate back to the original occurrence, or to the putting in motion of harmful forces, the whole award accruing at the culmination of the disability. An example of this view is the case of Johansen v. Union Stockyards Co. in Nebraska in 1916 (99 Neb., 328). On the other hand, should an injury be found not to be as bad as first believed, compensation is to be adjusted accordingly, as in Summit Coal & Mining Co. v. Industrial Commission in Illinois in 1923 (308 Ill., 121).

An important question in connection with the causation of blindness under the workingmen's compensation laws lies in the distinction between blindness from accidents and blindness from disease. These laws are now being made more and more to cover industrial diseases incurred in the course of work; but even apart from direct legislative enactment, it is probable that the courts would have taken a very liberal stand as to what is to be regarded as an "accident." The term would be made to include not only injuries of external, violent, and "accidental" character, but unexpected injuries of gradual aproach as well. A capital illustration of the attitude of the courts is to be found in the consideration of the effects of wood alcohol, a dread enemy of the human sight—something that has caused more than a few cases of blindness or of serious impairment to vision. In the case of Fidelity & Casualty Co. v. Industrial Commission in California in 1918 (171 Pac., 429), where atrophy of the optic nerve was thus induced, the matter was unhesitatingly declared to be an accident. Similarly blindness resulting from the continued and intense glare from sheets of steel in a strong light, with no protection afforded by goggles or otherwise, there being a constant strain on the eyes in the process, is regarded as from an occupational disease, in Zajkowski v. American Steel & Wire Co. in Ohio in 1918 (258 Fed., 9).

There are also numerous decisions having to do with such matters as the time or the manner of making complaints. Some of the decisions here are more liberal than others. In one case, Guderion v. Sterling Sugar & Ry. Co., in Louisiana in 1922 (91 So., 546), it is said that the limitation as to the time of making complaint runs only to the time when occurred the actual loss of sight in an eye, the loss being gradual and the danger not being realized. In Duffy v. Town of Brookline in Massachusetts in 1917 (220 Mass., 131), it was held that reasonable delay in giving notice of what amounted to practical loss of sight was no bar to recovery. In Bloom's Case in Massachusetts in 1916 (222 Mass., 434), it was held that knowledge conveyed to the superintendent was sufficient. In Marinaccio v. Flinn-O'Rourke Co., in New York in 1916 (172 App. D., 378), notice to the employer's physician was sufficient. On the other hand, in Central Locomotive & Car Works v. Industrial Commission, in Illinois in 1919 (125 N. E., 369), where an eye had been injured, but its serious condition had not been realized within the statutory period, no compensation was allowable. Likewise in Conley v. Upson Co. in New York in 1921 (189 N. Y. Supp., 473), no compensation was awarded where an eye had grown steadily worse and in time was entirely lost. A somewhat like case is Smith v. Solvay Process Co. in Kansas in 1917 (100 Kans., 40). Due regard is also had to the provision of the law barring award in case the employee is directly, and of his own free will responsible for the accident. In McAdoo v. Industrial Accident Commission in California in 1919 (181 Pac., 400), where an employee had refused to obey the rules as to wearing glasses in certain chipping operations, this was held to be "serious and willful misconduct," and no compensation was allowed.

Finally, there are a host of decisions which are really of application more general than to the eye alone (and which need not be cited), dealing with the interpretation of various terms in the statutes in their application to particular cases. An important group of such decisions has to do with the question whether the injuries under consideration have been brought about from acts or in occupations within the purview of the law. As to what may be regarded as having occurred in the due course of employment or as having duly arisen out of it, a broad policy is on the whole found adopted. Even though an injury has resulted more or less indirectly from the prosecution of a given task, yet if it has been in the general lines of the employer's business, and there is a clearly established connection, it will be considered as sufficiently embraced. If, however, such is not the case, and the act in question is not really incidental to the discharge of duty, no redress may be expected from the employer. Whether the occupation involved is one which may be considered to be provided for in the statutes, depends on the construction that the court may give.

On the whole, a note of increasing liberality is to be discerned in the construction of the workingmen's compensation laws, so far as their bearing on the loss of sight is concerned. Gratifying as this is, a far more important result, and a result toward which the force of the whole legislation should tend, will be the introduction of such safeguards and the insistence upon such care that loss of sight in industry will have become mostly a thing of the past.

POWER OF CONGRESS OVER RADIO COMMUNICATION

Important to Ascertain Where Lies the Power to Make the Laws Which Will Eventually Be Necessary in Dealing With This Great Discovery and What the Government Can Do to Help Realize Its Advantages

By Blewett Lee
Of the New York City Bar

THE development of wireless telegraphy, especially in its recent form of telephony or broadcasting, has been so rapid that the law-making power has been fairly distanced. Indeed, the legislator hardly dares formulate his rules until the subject has taken more definite form, for his principles may be wrong, and the possibilities of future progress defy analysis. The value of this discovery for popular education, for the increase of culture, and as a means of recreation, can hardly be over-estimated. To great numbers of people it brings within reach for the first time the spiritual treasures of mankind. Not only in the great spaces, but much more in the crowded cities, millions of people hear every night music and speeches over the radio. Recently the whole country listened to the proceedings of the national party conventions, and later heard the very words of the presidential candidates. Never had orators such an audience before.

While it would be premature to legislate in detail upon a subject so expansive and so full of surprises, it is already important to ascertain where lies the power to make the laws which will be necessary, and what the government itself can do in order that the benefit of the new discovery may be realized to the greatest advantage. This new invention has the possibility of becoming a fountain of knowledge and beauty in every house, but not without government aid. Where under our system of government lies the power to control radio-communication?

The international law of radio-telegraphy has already achieved considerable development, and has an extensive literature of its own. Enquirers may pursue the subject in the pages of Hyde and Oppenheim, and in the treatises on the law of wireless telegraphy, which have appeared in Germany, France and Italy.[1] The subject has raised in a different form the great question of the freedom of the air space, important also to the law of aviation. The innocent passage of Herzian waves is permitted by even the most exclusive sovereignties. This new art, which makes all the world neighbors, seems likely to play its part in breaking down the walls and filling the moats which divide mankind.

When it comes to the local laws of particular nations, foreign books are not very helpful in America, for the nations of Europe generally make wireless telegraphy part of the postal service, and treat the subject as a branch of the administrative law. As nearly as possible, wireless telegraphy is brought under the rules relating to telegraphy by wire. The foreign practice of making wireless telegraphy part of the postal service is, however, instructive as to the power of our national Congress.

The power of Congress over post offices and post roads would undoubtedly extend to radio-telegraphy as an auxiliary of the postal system. What the post carries is primarily intelligence. A new and better way has been found to carry it. The radio supplants the railroad and the post horse. The new messages would make a post road unnecessary; post offices with wireless apparatus would suffice. Government proclamations and public information would be communicated with the speed of light. Instead of copies of the Congressional Record laboriously carried to every voter, the oscillations of the ether would bring him the very speech of the orator.

This particular line of reasoning, however, would carry us no further than the authority to use radio-communication for postal purposes, whenever Congress chooses. Radio-communication may be used just as a railroad car, or a horse or a man, when found convenient.

While the national government has not taken over wireless telegraphy for postal purposes, it has done so for treaty purposes. By the international convention in regard to radio-telegraphs, known as the Berlin Convention, concluded July 5, 1912, and proclaimed July 8, 1913,[2] communication by wireless on the sea and between sea and land, and to a certain extent upon the land itself in connection therewith, has been brought under the domain of Federal law. By the act of August 13, 1912, c. 287, providing for the enforcement of the provisions of the Convention,[3] the laws of the United States have given effect to this treaty. The statute covers wireless telephony (section 6), and any communication the effect of which extends beyond the jurisdiction of a State (section 1). The latter provision points to the power of Congress over interstate and foreign commerce, upon which there will be more to say.

The treaty-making power of our Government is complete. Since the States do not have the treaty power, and this whole power is in the Federal Government, where a subject suitable for a treaty has been so dealt with by our Government, Congress has power to give full effect to the treaty by statute. The most noted instance of this kind has been in the case of the protection of migratory birds, as decided in the case of *State of Missouri* v. *Holland*[4]. Whatever scope belongs to the treaty on radio-telegraphy falls now within the undoubted power of Congressional legislation.

Without reference to any treaty, however, under its power to build and maintain a navy, Congress may

1. Hyde's Int. Law, Secs. 102, 103, 848, 855; Oppenheim's Int. Law (3rd Ed. 1920), Secs. 356, 357 a, 6, where authorities in foreign languages are cited; Meili, Die drahtlose telegraphie im internen recht und voelkerrecht (1908); Thurn, Die funkentelegraphie im recht (1913); Perret-Maisonneuve, La telegraphie san fil et la loi (1914); Viola, P. L., La telegrafia senza fili e la navigazione aerea nei loro rapporti col diritto internazionale (1912). Only a few of the more recent books are mentioned above. The bibliography is extensive.

2. 38 Stat. L. pt. 2, pp. 1672, 1707.

3. 37 Stat. L. 302; U. S. Comp. Stat. (1918) beginning at Sec. 10100.

4. 253 U. S. 416 (1920).

deal with this subject. Wireless telegraphy has become of primary importance for communication with ships, and it is necessary to prevent the use of wave lengths which would interfere with naval purposes, and anything else which might inconvenience naval communications.

There is also extensive use of radio-telegraphy by the army, and it is the best means available at present for communication with aviators in flight. The war power of Congress extends over radio-telegraphy both by land and sea, leaves no part of our national domain uncovered, and gives authority for legislation in times of peace as well as war, since it is in times of peace that preparation for war must be made. Our recent national experience, first as a neutral and then as a participant in the World War, has shown the enormous military possibilities of wireless communication. Considered merely from the point of view of espionage, Congress would be justified in providing for the fullest information in regard to transmitting and even receiving instruments, and arranging for such control as would be necessary over them all to prevent espionage. It will be remembered that President Wilson by executive order took control, on behalf of the Government, of all transmitting stations used in foreign business, and that messages in cipher were forbidden.[5]

The power of Congress which covers radio-communication most completely, however, is that over interstate and foreign commerce. That intercourse by telegraph between the States is interstate commerce has long been established.[6] The wire simply facilitates the passage of the electric oscillations. With instruments of present power it is almost impossible to avoid wireless transmission being interstate or foreign. Wireless telegraphy has been brought within the express provisions of Section one of the Interstate Commerce Act.[7] The present purpose of broadcasting is almost entirely commercial—to induce the purchase of radio receiving apparatus, or to call attention to hotels and business houses which furnish the music. This is nothing but advertising. There are churches and colleges which transmit for religious and educational purposes, but it is by means of commerce.

It is true that local state commerce also may be included in the operations of broadcasting, but where state commerce is so mingled with that which is interstate, that the control of interstate commerce requires control of state commerce as well, the power of Congress covers both.[8] In the present situation, unity of control is indispensable. Wave lengths must not conflict. In fact, the situation is so obvious that the national government is the only one which has undertaken control of such communication. National and uniform rules are necessary. Radio-communication is commerce, and falls into its proper place in our constitutional scheme as such. For practical purposes, it is all interstate or foreign commerce, for the communications whose effects are confined to one State, if such there be, are hardly worth considering. It is to Congress that the American people must look for the complete regulation of radio communication. A correspondence school engages in interstate commerce.[9] So does a radio station.

To such questions as: is radio-broadcasting a public purpose? is it a public utility? and the like, the answer must be that the radio is only an instrument—a great trumpet, as it were—and that everything turns upon the purpose for which it is used. The radio may fulfil the purpose of a newspaper, a school, a theater, a concert hall, a church, a public meeting. A city whose charter permits it, a State, or the Nation, may all engage in broadcasting for public purposes. Information, education, culture, even recreation, are thus made available to all. Public concerts are for a public purpose, and may be paid for out of taxes.[10]

In England all receiving sets are licensed. It is said that there are over three million such sets in use in the United States.[11] The United States is also said to be the only country which does not impose a license upon or regulate receiving sets.[12]

In Australia, so we hear, the Government proposes to broadcast the radio-programs, and defray the expense by a license tax on receiving instruments. An excise tax on such instruments is quite within the scope of national powers, and so would be a sales tax on radio instruments. The Marine and Army Bands delight the citizens of Washington with improving music; it would not be unconstitutional for all of us to have the opportunity to hear, or for the United States to provide the Band with an instrument which can be heard over land and sea. The City of New York has a broadcasting station. Undoubtedly, part of the work of broadcasting must ultimately fall upon the Government if radio-communication is to realize its possibilities for the education, improvement, cultivation, and incidentally the recreation of the people. Those who accept the public purpose of parks and public libraries will find it hard to draw the line against popular lectures and concerts, to say nothing of hearing the discourses of our public men. Radio-broadcasting in political campaigns, on fair and equal terms, might well be provided by the Government. It would not be too much to ask that a first class musical program, a suitable drama, and a good lecture should go out every night at public expense. Indeed, State Universities and Technical Colleges do well to busy themselves with popular education by radio-communication. Musical foundations might render a great public service by sending out programs of high artistic value.

The curse which is laid upon the present system of broadcasting for advertising purposes only, is that nothing very good can be had for what the directors are willing to pay, and it is a piece of good fortune when, for example, there is really great music, or a speaker gives a really fine message. There seems to be an unwillingness to pay for anything truly first-class, except very occasionally. For illustration, musical directors show an unwillingness to pay for copyrighted

5. 9 Am. Jour. Int. Law Supplement 115-116; 2 Garner Int. Law and the World War 410, Sec. 560 (1920).
6. Western Union Telegraph Co. v. Pendleton, 122 U. S. 347 (1887).
7. U. S. Comp. St. (1922), Sec. 8563, subsections (9) and (5).
8. Southern Ry. v. U. S., (1911) 222 U. S. 20, 27. Minnesota Rate Cases (1913) 230 U. S. 352, 399. R. R. Commission of Wis. v. C. B. & Q. RR. Co., (1922) 258 U. S. 563, 590.
9. International Textbook Co. v. Pigg, 217 U. S. 91, 106-7 (1910).

10. Hubbard v. Taunton, 140 Mass. 467, 468 (1886), 5 N.E. 157; Cooley on Tax., (4th Ed.) Sec. 203 (public libraries).
11. Report No. 719, 68th Congress, first session, page 6.
12. Secretary Hoover in Hearings on H. R. 7357, 68th Congress, first session, page 11.

13. Reference should be made to the interesting article by Mr. W. A. Shumaker in 28 Law Notes 25 (May 1924), entitled "Radio Broadcasting as Infringement of Copyright." He relies particularly upon Herbert v. Shanley 242 U. S. 591, (1917) and John Church Co. v. Hilliard Hotel Co., decided with it and upon Witmark v. Bamberger, 291 Fed. 776, (1923), opposed to which, however, is Remick v. American Automobile Accessories Co. 298 Fed. 628 (1924), concluding as follows:

1. Broadcasting matter covered by a dramatic or dramatico-musical copyright is an infringement without regard to the question of profit.
2. Broadcasting copyrighted music, plays, sermons, addresses, or lectures as an adjunct to advertising or to promote the sale of radio equipment is a performance for profit and infringes the copyright.
3. Broadcasting the contents in whole or in part of a book not within the rules just stated is not an infringement.

music. Indeed, the short-sighted policy has actually been proposed to take away all protection of copyright from music sent over the radio. This would indeed be killing the goose that lays the golden eggs. The only serious litigation which has hitherto arisen over radio-communication, has been whether music so transmitted is "for profit" within the meaning of the copyright law. Upon this point judges in the lower Federal courts have differed, and it will perhaps be necessary to await the opinion of the highest court before the question can be considered settled.[13]

New York City.

FORFEITURE OF VESSELS IN ENFORCEMENT OF NATIONAL PROHIBITION

By CHARLES S. DESMOND
Of the Buffalo, New York, Bar

LEGAL history is repeating itself in the proceedings now being brought by the United States in the Federal District Courts for the forfeiture of vessels seized for violations of the revenue and navigation laws. These proceedings *in rem*, used from the very beginning of our Government to prevent filibustering and check the importation of enemy goods and the smuggling of slaves, are now being revived as part of the scheme of enforcement of the "National Prohibition Act." Section 26 of Title II of the Act (41 U. S. Stat. L. 315) authorizes the seizure of vehicles or vessels in which intoxicating liquors are illegally transported and their sale at auction after the conviction of the transporter. But the use of vessels as rum runners inevitably involves also the violation of other statutes such as the customs and navigation laws. The enforcement officers are finding in the seizure and forfeitures provided by these statutes weapons more efficient for their purposes and not involved with the question of the guilt or innocence, or even the identity, of any individual. While this directness of attack may commend itself to the Federal officers, it is inevitable that the defense of such proceedings on the part of the vessel owner and the assertion of the claims of innocent parties in interest will involve questions of admiralty law vexatious to the general practitioner.

As early as 1796, in the case of The Vengeance (3 Dallas, 297), seized for illegally exporting arms and ammunition, the Supreme Court decided that proceedings by information for forfeiture of vessels for offenses committed on navigable waters were causes of admiralty and maritime jurisdiction and were not criminal causes, but civil causes *in rem*, to be prosecuted on the admiralty side of the Court without a jury. It was not without considerable discussion that this conclusion was reached, for it had been urged that the abuses in the disposition of revenue cases before the Revolution by the old Vice-Admiralty Courts, had been one of the grievances of the colonists. Counsel for the United States, who had contended that the case was a criminal one and not one of admiralty jurisdiction, endeavored to re-argue the question when he appeared in the later case of The Betsey (4 Cranch, 443), seized for violation of the Non-Intercourse Act, asserting that it had not been fully argued on his earlier appearance. Mr. Justice Chase, with something of tartness as well as finality, replied that he recollected that "the argument was no great thing, but that the Court took time and considered the case well." Chief Justice Marshall, writing for the Court, then re-stated the earlier holding that Congress had meant to discriminate between seizures on navigable waters and seizures on land and that the former were cases of admiralty and maritime jurisdiction. Seizures upon land for violation of the Federal Laws are also within the jurisdiction of the District Courts, but are cognizable on the common-law side and are triable by jury.

The decision in The Betsey established also the jurisdictional rule, which seems to be peculiar to this type of action *in rem*, namely, that the vessel or other *res* must first be seized by an administrative officer of the United States for violation of the forfeiture statute, before the judicial machinery may be set in motion by the filing of a libel of information and the subsequent arrest of the vessel by the United States Marshal, as the Court's officer and under its process. It is true that the statutes now being proceeded under do not, in every case, specifically mention a seizure but simply provide that for such and such a violation the vessel "shall be forfeited" or " shall be subject to forfeiture." But they are coupled up generally with administrative provisions concerning the method of seizure, by whom made, necessity of notice, etc., and it would seem to be clear that no attempt has been made to change the century-old rule requiring an executive seizure prior to judicial process and arrest. The administrative officer witnessing or having knowledge of a violation must first reduce to possession the *res* which is the instrumentality of the violation, and then, that the question of forfeiture may be judicially determined, call upon the court for an examination of the cause.

There is a practical reason why the owner of a vessel proceeded against may think it important to insist upon this prior seizure before he is called into court to defend his ship. There are Federal Statutes (R. S. 970 and 989), which give him redress, if the seizure is illegal and unwarranted, by setting up an action against the seizor for damages to be paid out of the United States Treasury. If the owner should allow the action to proceed without prior seizure by a Collector of Customs, or other proper officer, and succeed in defeating the charges against his vessel, he would be depriving himself of a right of action because he would have none to sue.

As a necessary consequence of this requirement of a prior seizure to obtain jurisdiction, the Courts were constrained to hold that an action of forfeiture must be brought in the District Court of the District where the property is held, and, further, that these jurisdictional facts must be pleaded, since the Federal Courts exercise but a limited jurisdiction, which must affirmatively appear. (The Brig Anne, 9 Cranch, 289). The rule

now finds expression in Admiralty Rules 21 of the Supreme Court, requiring that "all informations and libels of information upon seizures . . . shall state the place of seizure . . . and the district within which the property is brought and where it then is." The point of non-seizure is raised by filing and bringing on for hearing exceptions to the libel for insufficiency; but, being jurisdictional, it is good even if raised for the first time on appeal. In all other respects the libel, called a libel of information, follows the usual form in Admiralty and no special nicety is necessary in drafting the allegations.

After seizure, filing of the libel, issuance of process and arrest by the Marshal, there comes the turn of the owner, styled the claimant, who must, if he wishes to defend, file his claim to the vessel together with his answer, and, if he wishes to release his property, a bond. Under Admiralty Rule 30, he may object to answering any of the allegations of the libel "which will tend to expose him to any punishment for crime, or forfeiture of his property for any penal offense." An answer which neither admits nor denies the essential allegations of the libel, but puts the libelant to its proof, is sufficient under this privilege. (The Laura, 5 Fed. 133). It is no defense that the illegal acts complained of were done without the knowledge or privity of the claimant, or even that he is a bona fide purchaser of the vessel after the act and without notice of it. The question at issue is the guilt or innocence of the vessel, for the time being personified; the owner appears only by statutory permission to defend on her behalf; his non-participation is wholly immaterial on the question of forfeiture, for, on the commission of the illegal act, *ipso facto*, the vessel becomes the property of the United States by forfeiture and subject to seizure and forfeiture. (Goldsmith-Grant vs. United States, 254 U. S. 505). Congress seems to have recognized the harshness of this rule as applied to some cases and has sought to mitigate it by setting up a system whereby some forfeitures may be remitted on application to the head of the Department charged with enforcing the statute. We shall refer to this again.

Disputes over the validity and rank of the various kinds of liens, which may attach themselves to a vessel, have always engaged much of the attention of the Admiralty Courts and the question of forfeiture is not free from such difficulties. The National Prohibition Act provides specifically for the protection of innocent lienors in the proceeding which it authorizes for the sale of a vessel or vehicle and the distribution of the proceeds, but no statutory provision protects them against forfeiture under other statutes. However, the Supreme Court has held that holders of maritime liens, such as for seamen's wages, supplies, repairs, etc., which have attached between the date of the illegal act and the date of seizure, have valid claims against the fund resulting from a sale on a decree of forfeiture. (The St. Jago De Cuba, 9 Wheat. 410). Whether or not liens which had attached before the offense should have similar treatment was formerly an open question, but since the decision in North American Commercial Co. vs. United States (81 Fed. 748), there is no ground for refusing these claimants similar protection. All of this is in accord with the ancient doctrine of the Admiralty that the prime object is to preserve the credit of the vessel and thus keep her navigating, and that this can best be done by protecting those who, in good faith and for the benefit of all concerned, man the ship and fuel and victual her. In the picturesque language of Justice Johnson in the St. Jago De Cuba, the object is "to furnish wings and legs to the forfeited hull, for the benefit of all concerned, that is, to complete her voyage." As to procedure, the lienor, under Admiralty Rule 34, intervenes in the cause, by leave of court upon notice, setting up in his intervening petition the particulars of his claim, his good faith, his non-participation in the alleged offense, and, to avoid any default, his denial of any information or belief as to the truth of the allegations of the libel. A stipulation for costs in the usual form is also necessary.

The holder of a mortgage on a vessel is in a somewhat similar position, since the so-called "Ship Mortgage Act," which is part of the Merchant Marine Act of 1920, (41 U. S. Stat. L. 1005), provides that his interest shall not be terminated by forfeiture unless he "authorized, consented or conspired to effect" the illegal act. It may be that this saving clause applies only to mortgages given before the act of forfeiture but there would seem to be no good reason for such a distinction, since the mortgagee must, in any case, have acted innocently and in good faith. A vessel mortgage, unlike a claim for wages or supplies, is not a true maritime lien and so statutory authority was necessary to protect it against forfeiture. The mortgagee, like the lienor, must intervene to assert his interest. It may be remarked that judicial sales under Admiralty decrees are never subject to, but free of, liens, which are transferred to the proceeds of sale, and so, the lienor or morgagor, if he wishes to protect himself fully, must defend against the forfeiture, and then, if the decree goes against the ship, be prepared to bid at the sale. In any distribution after sale the holders of true maritime liens will have priority over a mortgagee unless it be a preferred one, seamen being taken care of first.

The reluctance of the courts to decree forfeitures, and the dicta found in many of the opinions in these cases, that "the cause is in the nature of a criminal proceeding" led to the enactment of a statutory rule of proof that is probably unique. Now found in Section 615 of the "Tariff Act of 1922" (42 U. S. Stat. L. 987) it provides that in all forfeiture actions under the Customs Laws, "when the property is claimed by any person the burden of proof shall lie upon such claimant; Provided, That probable cause shall first be shown for the institution of such suit or action to be judged of by the Court." The rum running vessel, unlike the rum running individual, is not presumed to be innocent and need not be proven guilty. The Supreme Court has taken this provision at its face value and interpreted it to mean that the prosecution need not make out a *prima facie* case, but has only to show that the seizure was made upon circumstances which warranted suspicion. (Locke vs. United States, 7 Cranch, 339).

After forfeiture has been decreed and a title to his erstwhile vessel "good against the world" has been conveyed to the purchaser at the subsequent sale, the owner has one card left to play. Section 5292 of the Revised Statutes authorizes the District Judge, before or after decree, and upon application of any person interested in the vessel, to conduct a summary investigation into the circumstances of the case, and to transmit a statement of the facts to the Secretary of the Treasury, who has power to remit or mitigate the forfeiture, upon such terms as he may deem just, if, in his opinion, it was incurred without wilful negligence or fraud. The following sections specify certain classes of cases in which application may be made to the Secretary direct.

HARLAN FISKE STONE

TRIBUTE TO RETIRING JUSTICE McKENNA; STONE NAMED TO SUCCEED HIM

ON Monday, Jan. 5, Associate Justice Joseph McKenna ended twenty twenty-seven years of service as Associate Justice of the United States Supreme Court. As he pointed out in his letter replying to one written him by his associates and read on this occasion, he has served under three Chief Justices—Fuller, White and Taft. Justice McKenna's retirement was accompanied by unusual ceremony, arranged as a testimonial of the deep affection in which he is held by his associates. Chief Justice Taft made the announcement and read a letter from the present members of the court, immediately after the marshal had placed a large basket of roses in front of the retiring member. Justice McKenna read a letter to his colleagues in reply, after which the entire court and the spectators arose and remained standing until he had withdrawn to the robing room. Only a few minutes before the resignation was officially announced Justice McKenna had delivered a decision. Following are the announcement by the Chief Justice and the letter read by him, and the reply thereto, as they appear in the official record of the court for the day:

"GENTLEMEN OF THE BAR: Mr. Justice McKenna has announced to us, his colleagues of the court, his purpose to retire from the bench. He has presented his resignation to the President, who has accepted it. As his associates we have expressed our feelings toward him in a personal letter which I shall now read."

January 5, 1925.

DEAR BROTHER MCKENNA: Your active membership in this court is ending after 27 years. The affectionate and charming intimacy of that relation is known only to those who have enjoyed it. Few have been permitted to share it as long as you have. Happy are you with such a retrospect of love, confidence, and usefulness.

What an extended and varied experience you have had! Going with your parents to California at the age of 12, you settled in the Golden State a little more than five years after the arrival of the Forty-niners. Your youth and young manhood were spent in the atmosphere of that community's irrepressible enthusiasm and inspiring confidence in its great future.

Admitted to the bar in 1865, twice district attorney of your home county, for two years its representative in your State legislature, your upward steps carried you to the National House of Representatives, where during four Congresses you served with distinction. Put to the test in one of your electoral campaigns, you declined to yield your convictions on what you deemed sound monetary principles, and in the face of overwhelming adverse local sentiment, you carried again your congressional district. You attached your colleagues in the House to you by your proved character and won the admiration and trust of the two great rival Republican leaders of that day.

Against your inclination, President Harrison induced you to become a Federal circuit judge, and to begin your experience on the bench with the birth of a tribunal which has since done much to expedite the administration of national justice—the Circuit Court of Appeals. Five years you had served there when your former congressional colleague, William McKinley, called you to his Cabinet as Attorney General. Then he appointed you a Justice of this court.

For more than a quarter century you have borne the burdens of intense judicial labor. More than half that time you have been the senior Associate Justice. Your opinions, found in 96 volumes of our reports, 170 to 266, number 633. In them you depart from conventional wording and adopt a distinctive style of your own, readily recognized by one familiar with the reports. It is characterized by clearness and force, with a grace of touch and aptness of phrase that stimulates the reader's interest. An examination of that array of judgments in cases, many of them of primary public importance, reveals how much of your trained mental energy, long experience with men and affairs, judicial and ethical spirit, and love of country have been poured into them.

Your pride in the court, its high traditions, and its courage has made deep impression on us who have enjoyed the benefit of your greater experience, example, and esprit de corps. Your fraternal nature, your loyalty toward each of us, your tenderness in times of strain and stress, endear you to us and make us feel deeply sensible of our loss.

May you have many years of happy and well-earned leisure, sweetened by thoughts of the affection and high regard of your associates, and still more by the knowledge of the good you have wrought in your great and honorable career. Farewell!

Affectionately yours,

WILLIAM H. TAFT.
OLIVER WENDELL HOLMES.
WILLIS VAN DEVANTER.
JAMES C. MCREYNOLDS.
LOUIS D. BRANDEIS.
GEORGE SUTHERLAND.
PIERCE BUTLER.
EDWARD T. SANFORD.

January 5, 1925.

MY DEAR CHIEF JUSTICE AND MY DEAR BRETHREN: I thank you for your expressions of esteem. I accept and appreciate even their praise as impelled by personal friendship and as a mark of it. They mitigate the regret—indeed, sorrow—that I feel in separating from the work of a tribunal so necessary to the existence of a constitutional government—a work whose guiding and prompting considerations regarded, it has so adequately performed, and it is assured prediction, will continue to perform.

To this sorrow I shall have the more intimate personal one of a separation from the companionship of you, my dear Chief and brethren. Here, again, is the mitigation that I shall carry to my retirement, as you so feelingly remind me, abiding reminiscences of it, the honor conferred, the pleasure it gave. And to it will be added the recollection of the association with the eminent men who preceded you in the constitution of the court and its work. May I say in some emphasis of my service that it was under three Chief Justices—Chief Justice Fuller, Chief Justice White, and you, my dear Chief, which is yet in instance, though soon to become a memory.

I conclude, assured by your words of regard, that while our official relations are this day severed, our

personal ones, their pleasure and honor, to me will be continued.

With these words of good-bye go my sincere and affectionate regards.

JOSEPH MCKENNA.

President Coolidge has named Attorney General Harlan Fiske Stone as Justice McKenna's successor. This is the second great appointment that has fallen to him within a brief period. It comes not only as a tribute to his known ability as a lawyer but also by way of recognition of the satisfactory way in which he has discharged the duties of the Attorney General. As is well known, Mr. Stone resigned the position of Dean of the Law School at Columbia University to enter the firm of Sullivan and Cromwell, a firm which has a great corporation and estate practice. He became the litigation expert, acting in the same role as John W. Davis does for Stetson, Jennings, Russell and Davis and Ex-Gov. Miller of New York for Miller and Otis. However, during the whole period of his deanship at Columbia he was connected with the active practice of his profession. As one of his associates said of him, "during this period he did as much teaching as any professor in the law school; he also disposed of the innumerable problems and details incident to his work as Dean and, as if this were not enough, he kept in daily touch with a law practice to which he gave his work as counsel."

Among the important cases in which Mr. Stone appeared before becoming Attorney General may be mentioned the recent hearings into the Jay Gould accounting proceedings. He represented the children of the Duchess de Talleyrand, the former Anna Gould. He also appeared for the Royal Card & Paper Co against the Dresdner Bank, of Berlin, his client obtaining a verdict of $150,000. A somewhat smaller verdict was awarded the National Brass & Copper Tube Co., represented by him in the suit against the Italian Government. Another notable case in which he took part as counsel is that of Alexander v. The Equitable Life Assurance Society, 233 N. Y., 300, where he succeeded in convincing the Court of Appeals that a sealed contract by an insurance company to pay an annuity to the widow of an officer of the company in consideration of past and future services to be performed by such officer was *ultra vires* and without consideration, thus reversing the decision to the contrary in 196 App. Div., 963. The last case argued by him before going to Washington as Attorney General was the DeLamar will case before the Appellate Division of the Supreme Court of New York. This will case, in which were involved many intricate questions of taxation, disposed of the estate of the late Joseph R. DeLamar amounting to about $20,000,000.

Mr. Stone's legal studies, contributed to law magazines, have been frequently cited by the courts in dealing with important questions of law. For instance, in the case of Epstein v. Gluckin the court modified what had theretofore been regarded as a rule of the courts of New York state on the basis of suggestions which were originally contained in an article by him on "The Mutuality Rule in New York." The state of law on that subject before the decision of Epstein v. Gluckin was indicated in the case of Schuyler v. Kirk-Brown Realty Co., 193 Appellate Div. (N. Y.) 269. Other judicial decisions in which the Court relied on articles by him as supporting the determination of the Court are reported in *Equitable Trust Co.* v. *Keene*, 232 N. Y. 290 at 295; *Whiting* v. *Hudson Trust Company*, 234 N. Y. 394 at 408, and *Safian* v. *Irving National Bank*, 202 App. Div. 459 at 463. In *Equitable Trust Company* v. *Keene*, the Court said: "And while not having the authority of a judicial decision, we nevertheless cite in support of what has been said a very thorough and well-considered discussion of the general subject of foreign exchange by Dean Harlan F. Stone of Columbia Law School (Columbia Law Review, vol. 21, 507)."

In 1918 the Secretary of War chose him to form—with Major Stoddard, of the Judge Advocate General's department, and Judge Mack, of Chicago—a special committee to review the cases of "conscientious objectors"—a delicate and important work which he performed with diligence and fine discretion, his superiors declared. As a member of this committee, he traveled all over the United States from cantonment to cantonment making studies of "slackerism" for the government. Later he wrote a notable book on his experiences. This war work was the nearest he ever came to politics, for his career has been singularly free of political activity. Later, when the then Attorney General of the United States, A. Mitchell Palmer, began his "red raids," Dean Stone—although hostile to all forms of Bolshevism—was outspoken in demanding protection of both aliens and American citizens in their Constitutional rights.

The main details of Mr. Stone's really remarkable career have already become familiar to the public in connection with his appointment to the Attorney Generalship. He was born in Chesterfield, N. H., Oct. 11, 1872, the son of Frederick Lauson and Ann Sophia (Butler) Stone. His ancestory dates back to the 17th century in Massachusetts. He received his collegiate education at Amherst and Columbia, finishing the law course at the latter institution, with which he was so long connected. President Coolidge was at Amherst at the same time he was, belonging to the class following Mr. Stone's.

Commercial Law League Branch Has Annual Dinner

Bench, bar and industry combined at the recent annual dinner of the New York Branch of the Commercial Law League of America at the Hotel Plaza in stressing the strides being made in commercial law, and in a broadening of the understanding between the commercial bar, the bench and the trade associations and merchants of New York. About four hundred members of the organization and their friends attended.

Edward B. Levy, president of the New York branch, presided as toastmaster, and speeches were made by Henry W. Taft, president of the Association of the Bar of the City of New York, who declared that there must either be a vast improvement in the administration of the bankruptcy law, "or the people will demand that we get along without that law"; Federal Judge Edwin L. Garvin of Brooklyn; Fred Blain Townsend, of Phoenix, Arizona, president of the Commercial Law League of America; Charles A. Boston, chairman of the Committee on Ethics of the New York County Lawyers' Association; and Charles L. Bernheimer, president of the Bear Mill Manufacturing Co., and chairman of the arbitration committee of the Chamber of Commerce of the State of New York. Mr. Bernheimer is considered one of the foremost authorities in America on arbitration.

AMERICAN DIVORCES IN FRANCE AND THEIR VALIDITY IN UNITED STATES

By Charles F. Beach
Member of Bar of Paris, France

THE grounds upon which divorces may be obtained in France are: (a) adultery (b) cruelty, and (c) conviction of an infamous crime. A foreigner seeking a divorce in France must have a cause of action under one of these categories. The French courts construe cruelty as a ground for divorce very liberally, and conduct of either spouse rendering the continuance of the marital relation impossible or intolerable would speaking generally be a good ground for divorce. Abandonment, ill-treatment, wilful neglect, desertion, habitual drunkenness, failure to provide, habitual indulgence in violent and ungovernable temper, grave verbal or written insults, refusal of conjugal rights, permanent insanity, communication of venereal disease, use of offensive or insulting language, abuse of children, are all examples of cruelty. A wife's extravagance and dishonesty in money matters may be cruelty. Counting certain duplications there are said to be in the United States three hundred and sixty-three recognized grounds for divorce. It is therefore possible to secure a divorce in France for almost any offence of either spouse which shocks the moral sense, it being the theory of the French courts that when two people can't live together comfortably, they should if they desire it be legally separated. Senator Capper's bill introduced in the last Session of the Senate and which is now in Committee, for a uniform divorce law in the United States, if it become a law, would substantially enact the French law as to grounds for divorce. The Scandinavian countries are discussing new legislation along similar lines.

It is the French rule that actions for divorce will not be entertained by the courts between citizens of countries where divorce is not recognized, for example, Italy, Spain, and some of the Central and South American republics. There is a different rule in Argentine as will appear hereafter. The courts are also likely to hold that the cause of divorce, when the action is between foreigners, shall be one recognized by the law of their own country. In applying this rule in actions for divorce brought by Americans the French courts will regard the country or sovereignty as a whole, not regarding the specific laws of local divisions (States) of the country. Accordingly a citizen of one of the United States may legally obtain a divorce in the French courts even upon a ground not recognized by his own State if the ground for his complaint is recognized by any other State, because as a citizen of the United States he is free to change his domicile to any State that recognizes the ground for divorce which he possesses. The French courts will therefore, entertain his action if the ground is recognized in the United States.

In order to give the French courts jurisdiction of an action for divorce the parties, or at least the plaintiff, must be "domiciled" in France. Here it must be remarked that *domicile* as used in this sense and as understood in France does not mean precisely the same thing as it sometimes and perhaps generally means in America. Here it means nothing more than residence, so that the rule is that a plaintiff must be resident in France in order to give the French courts jurisdiction. This residence must be bona fide and if it is in good faith no length of time is required to establish it. Thus one may come to France at any time with the intention of residing here and thus establish immediately such a residence as to give the courts jurisdiction. It is held however in the United States—more strictly—that to effect a change of domicile there must not be only a change of residence but an intention to abandon the former domicile and to acquire another as the sole domicile. Here domicile is used in the American sense and means more than residence. Upon this theory there must be both residence in the alleged and adopted domicile and intention to adopt such place of residence as the sole domicile.

In Dupuy v. Wurtz, 53 N. Y. 556, it is said:

> With respect to the evidence necessary to establish the intention, it is impossible to lay down any positive rule. Courts of justice must necessarily draw their conclusions from all the circumstances of each case, and each case must vary in its circumstances; and moreover, in one a fact may be of the greatest importance, but in another the same fact may be so qualified as to be of little weight.

In the matter of Newcomb, 192 N. Y. 238, the court speaking of change of domicile said:

> The subject is under the absolute control of every person of full age and sound mind who is free from restraint, unless it may be that the domicile of a wife is controlled by that of her husband as long as she lives with him. Subject to the qualification named, every human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention. A temporary residence for a temporary purpose, with intent to return to the old home when that purpose has been accomplished, leaves the domicile unchanged, but even if the residence was begun for a temporary purpose, intention may convert it into a domicile.

In Harral v. Harral, 39 N. J. Equity, 279—which was cited in the case of DeMeli v. DeMeli, 120 N. Y. 485—the court said: "That place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home." This is less rigid than the expressions in some of the New York cases, but it is not inconsistent with them. Thus in the Newcomb case *supra*, the court uses somewhat inelastic language when it refers to "an absolute and fixed intention to abandon one and acquire another", domicile, but it couples it with a conception of a mental process not marked by such fixity when it says that a change of domicile

may be made through "caprice, whim or fancy, for business or pleasure, to secure a change of climate or a change of laws". The fact is that an intention of the kind referred to is not susceptible of mathematical precision, and an intention which is of such an unstable character that it rests with the man to change it at will, provided only his intention is clearly indicated, is of such a character that it must require in addition to the actual fact of residence, very little evidence of intention to establish it.

The case of Harral v. Harral, *supra*, although not an action for divorce is quite in point on the question of domicile. The validity of a will in that case depended upon the domicile of the decedent, who being a resident of New York City, went abroad to study German and to make professional researches. He remained in Germany two years and then came to Paris, residing here with the complainant who lived with him as his mistress until they were married in February, 1877. They kept house in a village near Paris until he returned to America in May, 1878. In May, 1877, he wrote to a friend announcing his marriage and said that he was "happy and contented." The Chancellor concluded that the decedent had settled himself in France to live there and make it his home. Thus the purpose of the testator in going abroad was temporary, but he lived there for some years after he had accomplished his temporary purpose, and there was no specific circumstance indicating an intention permanently to change his domicile of origin. In Hegeman v. Fox, 31 Barb. 475, it was said that a change of residence on account of health cannot in all cases be considered inconsistent with a purpose to make a permanent change of domicile. Written statements are of course, "more reliable than oral ones". Dupuy v. Wurtz 53 N .Y. 556. They are not self-serving, but are pertinent evidence of intention even though made "for the sole purpose of making evidence." Matter of Newcomb, 192 N. Y. 238.

But we note another very important American rule as affecting French divorces. Where domicile in another country has been adjudicated in its court in a suit for divorce, the American courts on the principles of comity, will refuse to re-examine the question unless there are facts tending to show fraud or similar circumstance which would make it contrary to public policy to recognize the validity of a foreign decree. The rule is the same in the case of decrees of sister States which are given "full faith and credit" under the provisions of the Federal Constitution. The fact that a decision as to domicile is erroneous does "not impair the power to decide on the validity of the decision when questioned collaterally". Kinnier v. Kinnier, 45 N. Y. 535.

In Tiedemann v. Tiedemann, 172 App. Div. 819, aff'd 225 N. Y. 709, it was decided in New York that a Nevada court having jurisdiction of the parties has the power to "determine the essential facts with respect to domicile to confer jurisdiction upon it over the subject matter of the action. . . . Whether the question with respect to the plaintiff's residence in that State was actually litigated or by the defendant's default was determined under the law of the State on the allegations of the complaint" was regarded by the Appellate Division as immaterial, for the reason (not existing in Andrews v. Andrews, 188 U. S. 14, which was distinguished on that ground) that "there is in the decision upon which the decree was entered an adjudication that the plaintiff was a resident of that State, which the Supreme Court of Nevada deemed equivalent to domicile.

In Lie v. Lie, 96 Misc. 3, the Supreme Court of New York considered the following state of facts growing out of a foreign action for divorce: After a husband and wife had lived within the State of New York for some years, the wife in 1913 went to Norway. In 1915 her husband followed her to Norway, and there in August, 1915, obtained against her a decree of divorce on the ground of her adultery. The wife, the defendant, continued to reside in Norway, and after the Norwegian divorce married again in Norway. Her cohabitation with her second husband was the basis of the charge of the plaintiff in the New York suit, which was commenced upon the theory that the Norway court did not have jurisdiction to grant a divorce. The Norway court had found the plaintiff was an American citizen and a resident of New York, but had also found that the wife, although an American citizen, was residing in Norway and that Christiania was her forum. The Norway court having jurisdiction of the parties, the only question was whether it had jurisdiction of the subject matter, and that, the court held, depended on whether the domicile of either of the parties was within the territorial jurisdiction of the court, and upon that point the New York Supreme court said:

> This finding of a jurisdictional fact was made with both parties before the court. For all that appears evidence may have been produced which would warrant the Norway court in holding that defendant had the right to acquire a domicile in Norway and did so. In my opinion, therefore, I should accept this as a finding that the defendant was then domiciled in Norway, and hence should conclude that the court had jurisdiction of the subject matter of the action and therefore should hold that the judgment is binding under principles of comity upon the courts of this state.

It is not necessary to inquire whether the domicile requisite to jurisdiction in a French court requires the same proof of intention and fact as under the law of New York, because pursuant to this decision a reexamination as to whether the conclusion of a foreign court is correct or incorrect is not required. It is only necessary that it should appear that, having the question fairly before it, the French court passed upon it one way or the other. As was said by Mr. Justice Laughlin in the Tiedemann case, *supra*, the court having jurisdiction of the parties, "it was competent for that court to determine the essential facts with respect to domicile to confer jurisdiction upon it over the subject matter of the action, and whether the question of the plaintiff's residence in that state was actually litigated or by the defendant's default was determined under the law of the State on the allegations of the complaint, is, I think, immaterial for there is in the decision upon which the decree was entered an adjudication that the plaintiff was a resident of the state, which the Supreme Court of Nevada deemed equivalent to domicile."

If it should appear affirmatively that the court of another State or of a foreign country assumed under its laws to take jurisdiction of an action affecting the status of husband and wife even though neither spouse had or claimed to have a residence within the State or nation, American courts would almost certainly refuse to recognize the de-

cree; because a decree under such circumstances is "condemned by the principles of comity and private international law". Thus, in the case of DeMeli v. DeMeli, *supra,* the defendant being neither domiciled in Germany nor personally served there with process, a decree of divorce was held to be a nullity. Probably also if the foreign court had been deceived as to domicile, and if the facts amounted practically to fraud, there would be hesitation, if not a refusal to recognize the decree. (Miner on Conflict of Laws, 197; Kinnier v. Kinnier 45 N. Y. 535, 540.)

The domicile of the wife is that of the husband and she could not according to the older rule both in France and in the United States acquire a separate domicile for the purpose of bringing an action for divorce. But it is now clearly established in the United States that where the husband is in fault and a separation is justified the wife may acquire a separate domicile for the purpose of prosecuting an action in her new domicile for divorce. Williamson v. Osenton, 232 U. S. 619, Haddock v. Haddock, 201 U. S. 262; Atherton v. Atherton, 155 N. Y. 129; Clark v. Clark, 191 Mass. 128; Harteau v. Harteau, 14 Pick, 181, 185 (an illuminating decision by C. J. Shaw). It is believed that a French court in a meritorious case would not deny to an American wife a similar right to a separate domicile; and in practice the French judge at the outset of the litigation designates a separate domicile for the wife by a formal order.

The court must have jurisdiction of both parties. Accordingly it is necessary that the defendant have a residence in France or appear in the action in person or by counsel. Divorces by default find little favor anywhere. Personal service is not required by French practice. It cannot therefore, so far as the French courts are concerned, be a question of personal service upon the defendant within the jurisdiction. It is sufficient if the defendant appear by counsel (constitute an avoué) who acts for him in the proceeding. Service of process in France is made by a ministerial officer, called a huissier, who leaves the process in a sealed envelope at the residence of the party sought to be served. An endorsement is made on the notice that the huissier left it with the defendant or "with une personne à son service". This endorsement in the language of the practice is called "parlant à" abbreviation for parlant à Mr. or Mrs. So-and-So, and the endorsement concludes with the words "ainsi déclaré". This is valid service in France and the only service known to our practice here. It is sometimes possible, however, in order to meet exceptional requirements as to personal service in the case of an American divorce, to have the huissier serve the process personally upon the defendant. This, however, is irregular and unnecessary, with regard to French practice, and is of no more legal significance than the usual service which I have explained. Whether or not process be personally served upon the defendant, if there is an actual notice of the pendency of the divorce suit and if the defendant authorizes counsel to appear, such voluntary appearance is by American practice "equivalent to personal service of the process within the jurisdiction of the court in which the action is pending." Strauss v. Strauss, 122 App. Div. 729. (A New York case.)

Furthermore the action so that the decree may have unquestioned validity in the United States, should be a contested action (contradictoire, as the French phrase is). Questions of alimony, custody of children, separate residence, delivery of personal effects, property right and any sort of constitute grounds for a contest. In this state of case the divorce upon this point will be valid not only in France, but also in America and everywhere else in the world. But if the defendant as part of the defence, raises the question of jurisdiction at any stage of the proceeding and thereby insists that the action should not have been brought in France, the court is very apt to dismiss the suit, leaving the parties to their home jurisdiction. If the question of jurisdiction is not raised by the defendant and if jurisdictional facts appear the action proceeds.

As a general rule in order that the French divorce so obtained may be valid in any foreign country, it must comply with the requirements of the law of such other country. Thus as between citizens of New York, it is insisted by some careful practitioners and it may be desirable in view of the decision in the Atherton case (181 U. S. 155) that the defendant be personally served with process within the jurisdiction of the divorce court. It may, however, be strongly insisted that an action for divorce is of equitable cognizance and that appearance by counsel gives the court jurisdiction as fully as personal service could do. Freeman v. Freeman, 126 App. Div. 601; Dodge v. Dodge, 98 App. Div. 85; Weaver v. Weaver, 160 N. Y. S. 642 (which seem to fix the rule in New York); Castell v. Castell, 28 La. Ann. 91; White v. White, 60 N. H. 210. Counsel will be held strictly to satisfy the court by warrant of attorney or other proper written instrument of their due authorization to bring the defendant into court. Lynde v. Lynde, 162 N. Y. 405, S. C. 181 U. S. 183; Jones v. Jones, 108 N. Y. 415. The New York theory contrary to the general rule—a theory rather than a rule—that an action for divorce is an action *in personam* with its resulting consequences may very well be contested in the case of a decree of divorce regularly rendered in France. The tendency of our American courts to insist strongly upon the application in foreign countries of local American notions especially about procedure is not to be encouraged and is not in line with modern rules of international law. For example, the Republic of Argentine where by the local laws divorces are not allowed, recognizes a divorce regularly granted in a foreign country to citizens of the Argentine. And rabbinical divorces valid where granted will be recognized in New York, Miller v. Miller, 70 Misc. 368, although of course not valid if attempted to be granted in that state.

In reference to the validity in one State or country of divorces granted by the courts of another State or Country Mr. Bishop lays down the following propositions (2 Bishop on Mar. Div. and Sep. sec. 128) which he stoutly maintains and learnedly defends "First, the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offence may have occurred, if neither of the parties has an actual bona fide domicile within its territory: secondly to entitle the court to take jurisdiction it is sufficient for one of the parties to be domiciled in the country; both need not be, neither need the citation, when the domiciled party is plaintiff, be served personally on the defendant, if such personal service cannot be made, but there should be

reasonable constructive notice, at least; thirdly, the place where the offence was committed whether in the country in which the suit is brought or a foreign country is immaterial; fourthly the domicile of the parties at the time of the offence committed is of no consequence, the jurisdiction depending on their domicile when the proceeding is instituted and the judgment is rendered; fifthly it is immaterial to this question of jurisdiction in what country or under what system of divorce law marriage was celebrated; sixthly without a citation within the reach of process, or an appearance, the jurisdiction extends only to the status and what depends directly thereon, and not to collateral rights."

In certain States of the Union it must not be overlooked that there are statutes to the effect that divorces obained without the State by their citizens for causes not recognized by the local law, will be held invalid in that State. In such a case a divorce regularly obtained in France may be valid everywhere except within that State.

Paris, July, 1924.

AMERICAN LAW INSTITUTE'S COUNCIL MEETS

THERE was an interesting and important meeting of the Council of The American Law Institute on Dec. 5, 6 and 7 in the Trial Room of the Association of the Bar of the City of New York. Those present were: George E. Alter, Former Attorney General of Pennsylvania; Henry M. Bates, Dean of the University of Michigan Law School; James Byrne, of New York; Judge Benjamin N. Cardozo, of the Court of Appeals of New York; Judge Frederick F. Faville, of the Supreme Court of Iowa; H. M. Garwood, of Texas; William Browne Hale, of Illinois; James P. Hall, Dean of the University of Chicago Law School; Judge Learned Hand, of the U. S. District Court, Southern District of N. Y.; William V. Hodges, of Colorado; Edward J. McCutchen, of California; Nathan Matthews, of Massachusetts; John G. Milburn, of New York; Victor Morawetz, of New York; George Welwood Murray, of New York; Judge Emmett N. Parker, of the Supreme Court of Washington; Elihu Root; Judge Marvin B. Rosenberry, of the Supreme Court of Wisconsin; Judge Arthur P. Rugg, Chief Justice, Supreme Judicial Court of Massachusetts; Harlan F. Stone, Attorney General of the United States; George W. Wheeler, Chief Justice, Supreme Court of Errors of Connecticut; George W. Wickersham, Former Attorney General of the United States.

The Council held morning and afternoon meetings on Friday, Saturday and Sunday. Almost the entire time of the meeting was occupied in discussing the drafts of parts of the restatements of Contracts, Torts, and Conflict of Laws which had been submitted by the respective groups working on those subjects. Joseph H. Beale, Francis H. Bohlen, Samuel Williston and Floyd R. Mechem, respectively the Reporters in Conflict of Laws, Torts, Contracts and Agency were present. The first matter considered was the draft on Contracts covering definitions and formation of contracts down to the subject "Consideration." The seventy-three sections of the draft were gone over section by section, everyone present taking an active part in the discussions which were always opened by a question directed to the Reporter and his reply thereto. At the conclusion of the discussion of the draft, the Council, by a unanimous vote, directed that, as amended by the Council, it should be submitted to the next Annual Meeting of the Institute for tentative consideration with a view to suggestion and criticism. The part of the restatement of Conflict of Laws dealing with Domicil was then taken up section by section and a similar resolution adopted. The draft of the part of the law of Torts dealing with Assault, Battery and False Imprisonment was the third and last subject considered. It, too, on the conclusion of the discussion of its sections, was referred to the next Annual Meeting for tentative consideration.

The Annual Meeting was postponed from February to Friday and Saturday, May 1 and 2, in order to give the Reporter time to conclude the preparation of preliminary drafts of the accompanying parts of their respective treatises. Copies of the parts of the restatement to be submitted to the Annual Meeting, together with copies of the preliminary drafts of the accompanying treatises, will be distributed to the members of the Institute at least three weeks before the Meeting. As usual the Meeting will be held in Washington, D. C.

The action of the Council in respect to these three drafts shows that the work of the Institute's editorial staff, which has been going steadily forward for the past 18 months, had brought the Restatement to a most important stage of its development. Within the next two or three months the five hundred and fifty odd members of the Institute will have their first opportunity to examine concrete examples of the work. The Council, the Reporters and their Advisers will have the benefit of the critical examination of the leaders of the legal profession in all parts of the country, not only of the law of the particular subjects dealt with in the drafts, but of the form which has been tentatively adopted. This critical examination is necessary. Although each of the drafts has been built up by the Reporter and his Advisers, as the result of numerous conferences over prior drafts, and though each section has been the subject of explanation and debate at the recent meeting of the Council, everyone connected with the work realizes that, before any portion of the Restatement of a subject should be published as an official publication, it must receive the careful scrutiny of members.

The Council adopted a budget for 1925 carrying over $105,000, and provided for numerous conferences throughout the winter between the Reporters and their respective Advisers. It also considered the Report of the Director on the practicability of preparing a restatement of the law of Business Associations and decided to undertake that subject for restatement, beginning with Business Corporations. The Director will act as Reporter.

TRADE REGULATION

A Department Devoted to a Review of Recent Federal Trade Commission Rulings and of Court Decisions Relating to Unfair Practices

By HERMAN OLIPHANT

Competitive Practices

VOGUE COMPANY vs. Thompson-Hudson Co.[1] decided by the Circuit Court of Appeals, Sixth Circuit, represents an interesting extension of the law of unfair competition. The plaintiff was the publisher of a magazine devoted to styles of clothing. The defendant used the trade symbol of the plaintiff's publication, consisting of a large letter "V" with certain additions, as a mark upon ladies' hats which the defendant was marketing. The plaintiff sought an injunction and damages. Damages were denied because if any had been shown, they were of the most general sort. The injunction was granted although the parties were not competing in the sale of hats. As a sale by the defendant under the plaintiff's mark would not deprive the plaintiff of a sale which it otherwise would have made, it is clearly not a case of "passing off." If the defendant, however, sold inferior hats under this mark purchasers, assuming they came from the plaintiff or had his endorsement, would lose confidence in the plaintiff's magazine as an arbiter of fashions. The court thought the defendant's conduct "pregnant with peril to the plaintiff" and in consequence issued the injunction. It is therefore a case, not of an actual, but of a potential disparagement of goods held to be enjoinable without proof of special damage.

In the National Biscuit Company vs. Federal Trade Commission,[2] the Circuit Court of Appeals of the Second Circuit vacated an order of the commission that the Biscuit Company should give the same price discount for quantity purchases to separate stores buying in co-operation as it gives to chain stores owned by a single corporation. The case is in essence like the Mennen case decided by the same court and already reviewed in this department.[3]

In Fox Film Corporation vs. the Federal Trade Commission,[4] the Court of Appeals of the Second Circuit sustained an order of the commission commanding the Film Corporation to desist from reissuing old films under new names thereby deceiving owners of photoplay houses. Proof of such reissuing in but three cases out of the great number of issues by the corporation was held to be sufficient to sustain the order. The fact that the company had already ceased the practice was held to be no bar to the issue of prohibition.

Combinations

The "rule of reason" announced in a dictum in the Standard Oil case does not seem to have affected the decision in any case in the Supreme Court since its promulgation. Some support for the rule is found in the United States Steel Corporation case, but the results there reached are adequately supported upon other grounds. It is clear that, prior to the Sherman Act, the common law rule in this country was that a contract not to compete following the sale of a business or a term of employment was valid unless unreasonable in space or time. It is equally clear that the well settled common law rule was that an agreement among independent competitors to fix prices, limit production, or apportion business is both void and illegal however few competitors are involved and however "reasonable" the limits are which they put on prices, productions or competition. The same rule applies to combinations of independent competitors.

It is not known whether the "rule of reason" announced in the dictum in the Standard Oil case was intended to affect the existing laws. That it has not affected the results reached by the Supreme Court in deciding cases since is quite clear. Accordingly, where the members of a trade association of pottery manufacturers fix prices by agreement and are indicted, it is not error to refuse to instruct that, "It is only an undue and unreasonable restraint of trade that (works an injury to the public) and is deemed to be unlawful." The holding by the Circuit Court of Appeals of the Second Circuit[5] that refusal so to instruct was error is itself error and would be reversed by the Supreme Court, did the case go there, as is shown in numerous decisions by that court since the Standard Oil case.

There is only one way out of the confusion produced by the announcement of the "rule of reason," and that is to begin the discussion of all problems in this field by sharply distinguishing (1) cases of contracts not to compete following the sale of a business or following a term of employment from (2) cases of contracts and combinations of independent competitors to fix prices, limit production or apportion business and then to realize that distinct bodies of law apply to these two kinds of cases. It is believed that the courts and the legal profession will soon come to recognize in Mr. Justice Taft's differentiation and solution of these two problems found in his opinion in the Addison Pipe Co. case[6] the only way out of our present difficulties and confusion. This opinion is easily the soundest piece of scholarship on this subject to be found anywhere in the books.

The decision of the Supreme Court in National Assn. of Window Glass Mfgr's. vs. U. S.[7] holding legal an agreement among hand-made glass manufacturers limiting production is not in conflict with what has been said, as that result is fully supported by the presence of unusual facts, which made it impossible for this agreement to affect the price of glass.

An organized sugar exchange dealing in futures

1. 1924, 300 Fed. 509.
2. 1924, 299 Fed. 733.
3. 9 A. B. A. J. 210.
4. 1924, 296 Fed. 353.
5. Trenton Potteries Co. v. U. S. 1924, 300 Fed. 550.
6. U. S. v. Addison Pipe and Steel Co., 1898, 85 Fed. 271.
7. 44 Sup. Ct. 148. See reviews of this case in this Journal, Jan., 1923, p. 351 and April, 1924, p. 847.

is not a combination in restraint of trade. In so holding[8] the Supreme Court reached the result forecast by the holding in Chicago Board of Trade vs. U. S.[9] The Court points out that abuses in the form of corners violate the Sherman Act[10] and the possibility of abuses makes constitutional congressional regulation of organized exchanges.[11]

A bill in equity for the dissolution of the trade association of cement manufacturers was sustained by Judge Knox in the southern district of New York. His finding of fact that the manufacturers by reason of the exchange of statistics did by common consent and concert of action limit the production of cement fully sustains his holding that the association was violating the Sherman Act under the doctrines announced by the Supreme Court in similar cases.

Section 7 of the Clayton Act prohibits a corporation to purchase any of the share stock of a corporation if the effect "may be to substantially lessen competition" between the corporations or to restrain commerce, or tend to create a monopoly. Under this section and section 5 of the F. T. C. Act (prohibiting unfair methods of competition), the Circuit Court of Appeals of the Ninth Circuit sustained[12] an order of the Federal Trade Commission requiring a dissolution by the sale of stock so owned under the following circumstances: The president and stockholders of Swift & Co. owned 45% and the officers of the Armour, Cudahy and Morris companies owned 30% of the share stock of the Western Meat Co., which was doing a factory business from San Francisco in various states, including California and Nevada. Its business was managed by Louis Swift from Chicago. The Western Meat Co. bought all of the share stock of the Nevada Packing Co. located in Reno, Nev. This company also bought and sold in various states including California and Nevada. It appeared that the Nevada Packing Co. had gross sales of $1,250,000 during the year of the stock purchase. How much of this was competitive did not appear, so that the extent to which the stock purchase lessened competition is not disclosed. The court did not advert to this defect in the record as it came from the Commission. If the stock control must tend substantially to lessen competition, the degree of such lessening would seem to be a vital fact which should clearly appear in the Commission's findings of fact.

A like order under Sec. 7 of the Clayton Act had been sustained in the Third Circuit in Aluminum Co. of America vs. F. T. C.[13] Before the dissolution, the controlled corporation had contracted debts to the Aluminum Co. The former became insolvent and ceased operation. The Circuit Court of Appeals properly denied[14] an application to modify the former order so as to prohibit the Aluminum Co. from collecting these debts by purchase of the physical properties of the defunct corporation at an execution sale. The Clayton Act does not prohibit the purchase of physical assets, and no rule of law prohibits the purchase of non-competing property.

8. U. S. v. N. Y. Coffee & Sugar Exchange, 1924.
9. 246 U. S., 231.
10. U. S. v. Patten, 226 U. S., 525.
11. Chicago Board of Trade v. Olsen, 262 U. S., 1.
12. Western Meat Co. v. F. T. C., 1924, 1 F. (2d), 95.
13. 284 Fed., 401.
14. Aluminum Co. of Am. v. F. T. C. 1924, 299 Fed., 361.

Powers and Procedure of the Federal Trade Commission

Section 5 of the Clayton Act provides that a final judgment or decree in any criminal prosecution or proceeding in equity brought on behalf of the United States under the anti-trust laws, shall be prima facie evidence in any suit for damages brought against an alleged violator of the anti-trust laws. It has been held that this provision is not applicable to a finding and order by the Federal Trade Commission.[15]

The Supreme Court in F. T. C. vs. American Tobacco Co.[16] has held that the very broad provisions of Sections 6 and 9 of the F. T. C. Act concerning the powers of the Commission to inspect the books and records of private companies do not free it from the necessity of laying some foundation showing that records asked for contain evidence bearing on a complaint. A demand for all correspondence with customers during a given year is too broad, as it may unnecessarily include documents relating only to intra-state transactions and much matter having no bearing on any complaint of violation of law.

There follows an interesting statement[17] of the rules of evidence applicable to the Federal Trade Commission: "We are of opinion that evidence or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done. The Trade Commission, like many other modern administrative legal experiments, is called upon simultaneously to enact the roles of complainant, jury, judges, and counsel. This multiple impersonation is difficult, and the maintenance of fairness perhaps not easy."

A New Year's Wish

"1. That all eligible members of the bar join the Denver Bar Association.

"2. That all members attend every meeting.

"3. That we display a little more the milk of human kindness towards one another and that our cases be ready for trial when called.

"4. That we get a fee commensurate with the work we perform and that we quit working for nothing, except in charitable cases.

"5. That we will go on any committee to which we are assigned.

"6. That we will give our own business a little closer attention, and will install such modern equipment as will make our offices real places for the doing of 'law business.'

"7. That we will drive the shyster lawyers from our midst.

"8. That we will join the American and Colorado Bar Associations.

"9. That we will uphold the hand of every man who is attempting to accomplish a worthy object, and will endeavor to further the interests of our city by giving liberally of our time, our money and our skill."—*Denver Bar Association Record.*

15. Proper v. Jno. Bene & Sons, 1923. E. D., N. Y. 295 Fed., 729.
16. 1924. Oct. Term 1923 No's 206, 207.
17. Jno. Bene & Sons v. F. T. C., C. C. A. 2nd, 1924, 299 Fed., 468.

A CONSTITUTIONAL RETROSPECT

By William A. Robinson
Department of Political Science, Dartmouth College

WHEN some future historian of American institutions attacks the decade following the inauguration of President Wilson he will be confronted with interesting problems of interpretation. From some sources he will be able to prove that a great wave of socialization and humanitarian reform, starting in the Progressive agitation of 1912, continued to flow throughout the period. From other sources he will draw the conclusion that there was a steady disintegration in American institutions, a decline in national integrity and morale, and that if muck-raking literature is less abundant than in the preceding decade, the cause is to be found merely in discouragement on the part of the writers and apathy and indifference on the part of the public. Or again, he may attempt to show how, during and following the World War, there was a great conspiracy aiming at the overthrow of our constitutional principles, that it was found necessary to curb it by repressive laws, by deportations, by various forms of censorship, and that it was finally frustrated by the patriotic efforts of various organizations of "sentinels," "guardians" and "hundred per centers." But when he turns to the yellow and faded volumes containing the records of constitutional conventions, statutes, and amendments what will be his impression? It is likely that earlier conclusions will have to be revised or discarded.

Ten years ago, one of the commentators on the Progressive movement announced that its principal objects were, the broadening of governmental functions to relieve economic and social disabilities, the elimination of corrupt influences from government, and the establishment of more effectual popular control over governmental machinery. It is a difficult matter to measure actual progress in any of these lines, especially so, since the Progressive Party has apparently gone the way of all third party movements and the heirs are fighting over the right to use its creed and ritual and to invoke its patron saints.

An examination of almost any statute book, party platform, or legislative program will slow the steady and unremitting growth of government functions. A western governor declared not long ago that the war had ended "the drift toward monarchical socialism which well intentioned people sought to graft upon the structure of our organic system." It is true that burdensome taxes and experience with governmental waste and incompetence during the war, have caused certain revulsion of sentiment toward such activities, but it is doubtful if the process has been more than slightly retarded. Certainly it has not been blocked. The court which upheld the constitutionality of the New York rent laws on the ground that "individual rights in property extend only so far as the preponderant public sentiment of the time deems that the welfare of the community can safely permit them to extend" and that the individual's losses must be considered as made up "by the share he derives from the benefits thereby secured to the community," is putting in scientific form a popular belief. It may be distasteful to many, it may involve waste and foolish experiment, but it is an undeniable condition. Debate today is on the competence of government to undertake specific enterprises. The general principle has long been accepted.

It is a difficult matter to prove anything as to the success of efforts against corruption. Not long ago the best opinions would probably have concurred in a statement that conditions are vastly better than those of twenty years ago. Confidence has been disturbed by recent revelations in Washington. Against this can be set the notable advance toward clean and honest government in many states and cities. Political corruption is always associated with war and reconstruction. While the corruption issue failed to play a decisive part in the recent Presidential campaign there has been less indifference and cynicism than in the days of the Whiskey Ring and Star Route frauds. But it also shows that civic righteousness needs something more than the crusading zeal of the muck-raking era. Above all it shows the need of effective and vigorous leadership that stands on broad principles of honesty, efficiency and progress, capable of disregarding petty sectional and political interests.

The "restoration" of popular control over government is perhaps the most interesting proposition because it involves the fundamentals of American constitutional and political theory. Here is to be found evidence of the deep seated conservatism of the American people. For more than a century there were certain dogmas which all true Americans were expected to accept. We had the only free, enlightened, and democratic institutions in the world. To question the virtues of our system was treason. But in the nineties came reaction. The muck raker began to unearth unsavory facts. Economic conditions changed and no longer was the United States a land of unlimited opportunities. There grew up an extensive literature of pessimism. Then followed scientific criticism and investigation. The later critics paid much less attention to the wickedness of putting pig's ears in the canned chicken and much more to the principles of administration as applied to food inspection. The fact that the chairman of the committee on public utilities was able to buy a house or a new motor car a few days after reporting favorably a vicious franchise measure was less significant than the organization which made such iniquities easy and safe. Dogmas were submitted to scientific analysis. Odious comparisons were made with European systems. Foolish conceit and blind adherence to tradition were effectively exposed. But what have been the concrete results measured by structural changes?

We have had a comfortable feeling that however bad state and local government might be, there was always Federal power in the background, relatively honest and efficient, and ready to materialize in one form or another when emergency called. Occasionally materialization took the form of a highly trained and efficient young man with a Springfield rifle and a bandolier of ball ammunition. Unhappily there has been a decline in prestige. The country had a surfeit of Federal administration during the war. People tell anecdotes about the stupidity, incompetence, or high-handedness of tax collectors. The honesty of Federal administra-

tion has been discredited by the scandalous conditions discovered in the Veterans' Bureau and the Prohibition Enforcement service. Nevertheless it is inconceivable that there should be any extensive effort to alter the fundamental structure of that government. Doctrinaires may amuse themselves by speculating on what a new constitutional convention might accomplish, but the ordinary mind shrinks from such a possibility and the storms of propaganda of all sorts which it would provoke. Federal power will doubtless continue to expand in spite of protests, although there are signs that the pending Child Labor amendment may be successfully opposed as involving too broad an exercise of Congressional authority. There will doubtless be a few corrective amendments, administrative abuses will be remedied, the Supreme Court will continue to adapt its decisions to changing conceptions of property rights, there may be closer cooperation between President and Congress, but it is safe to predict that there will be no alteration in the direction of a parliamentary system.

In the field of state and local government the situation is different. There is little sanctity attached to state constitutions or city charters. They are continually undergoing repairs and alterations and it might be expected that here would be found evidence of an innovating spirit in government.

This is true of the cities. It is hard to realize in view of the spread of commission and manager government, improved public service and the steady progress of the efficiency movement that all of these reforms were recently opposed as "un-American," "monarchical" or "opposed to the genius of our institutions." But municipal improvement at best is local and to a great extent dominated by conditions prevailing in the State.

For the last twelve years there has been a rapidly increasing literature on State government. There has been a growing appreciation of the fact that the city has steadily improved while the State has remained stationary or even retrograded. A large number of able publicists have questioned the theory of separation of powers and shown its futility in a government whose duties are primarily non-political. Beginning with Governor Hodges of Kansas, who in 1913 boldly attacked the time-honored system and advocated the creation of a small unicameral legislature in which the governor should have a seat, a considerable number of men in political life have supported the theorists. But what have been the concrete results? Oregon in 1914 voted down an amendment abolishing the Senate. Maryland in 1916 adopted a budget amendment which permitted the appearance of the governor in the legislature to defend his financial policy. The subject was briefly discussed in a few constitutional conventions. Except for the Maryland amendment results have been practically nil. Furthermore, some states like Rhode Island and Connecticut have clung obstinately to an antiquated and unrepresentative system of rotten boroughs which violates every principle of good government.

There has been a noteworthy series of constitutional conventions in the last twelve years. Ohio, New York, Arkansas, Massachusetts, New Hampshire, Louisiana, Nebraska, Illinois, and Missouri have revised their fundamental law. Actual changes have been few, and in the case of New York, Arkansas, New Hampshire, and Illinois the work of the convention failed to win the approval of the electorate. Most of the recommendations of the Missouri convention were also rejected. Perhaps the most noteworthy utterance in the course of these proceedings was Mr. Root's famous arraignment of the existing system in New York as unresponsive to public will, inefficient in administration, and too often subject to the sinister control of an "invisible government." Unsuccessful efforts were made in several states to introduce the principle of the short ballot. Massachusetts adopted a conservative form of initiative and referendum. Ohio now requires a five-sixths majority of the Supreme Court in declaring laws unconstitutional. But for the most part changes have been confined to the administrative details or the removal of old clauses which stood in the way of present day needs in taxation or legislation. New limitations have been imposed in the hope of preventing abuses. Judicial organization in a few cases has been simplified and improved. Nor have amendments submitted by the legislatures from time to time been much more radical. Most of them have been essentially statutory in character, authorizing the assumption of new functions by the State.

But if general dissatisfaction with the existing form of government has not succeeded in producing constitutional changes or that experimentation which was expected to prove one of the great merits of federation, it has not ceased to make itself heard and felt. The rapid increase of tax burdens has resulted in extensive improvements, in most cases by legislation enactment. Governor Lowden of Illinois became a national figure by a successful fight to secure administrative reorganization in his state, a result accomplished in 1917. In the seven years following a dozen or more states have made similar improvements and budgetary reform has been even more widespread.

Two instrumentalities of which much was expected, the initiative and referendum, and the direct primary have lost standing in recent years. They are still retained and are likely to continue for there remains a vivid recollection of abuses which were almost unassailable prior to their adoption. The first has certainly not obviated the need of an adequate legislature, nor has the direct primary broken the power of the boss and produced an improved leadership and public service.

But it is impossible to believe that thorough-going changes in state government will not eventually be brought about. Demoralization in most states in the enforcement of criminal law has become a national disgrace. The broadening of state functions goes steadily on and the strain cannot be met by a mere coordination of administrative agencies and establishment of executive responsibility. Furthermore, a growing bureaucracy will necessitate a more intelligent and effective legislature and it is hard to see how such a body can be secured unless the great mass of constitutional checks be reduced and its organization be such as to secure a greater measure of responsibility, dignity, and popular appeal.

The slowness of constitutional changes in the past decade makes doubly ridiculous the current fear that the overthrow of our institutions is impending. When the voter has failed to elect constitutional delegates or legislators who would make needed alterations or to adopt the few changes which the conventions or legislatures actually proposed, it does not appear likely that the advocates of Communism will make greater headway. More serious dangers are to be found in the constant demand for favors by highly organized and noisy minorities, a condition which is aggravated by the difficulty of enforcing party responsibility in the present antiquated and cumbersome governmental organization.

AMERICAN BAR ASSOCIATION JOVRNAL

BOARD OF EDITORS

EDGAR B. TOLMAN, Editor-in-Chief.....Chicago, Ill.
HORACE KENT TENNEY.....Chicago, Ill.
JOHN B. CORLISS.....Detroit, Mich.
CHESTER I. LONG.....Wichita, Kan.
HERMAN OLIPHANT.....New York, N. Y.
R. E. LEE SANER.....Dallas, Texas

Subscription price to individuals, not members of the Association nor of its Section of Comparative Law, $3 a year. To those who are members of the Association (and so of the Section), the price is $1.50, and is included in their annual dues, $6. Price per copy 25 cents.

Office: 1612 First National Bank Bldg., 38 South Dearborn Street, Chicago, Illinois

THE BLACKSTONE MEMORIAL

"Every member of this Association who went to England last summer should, and if his attention is directed to the subject, I am sure will, contribute to the cost of the statue of Sir William Blackstone, which was presented in the name of the Association to the British Bar, and which is to be located in the Great Hall of the Law Courts in London.

"At the time of the presentation, the sculptor, Mr. Paul W. Bartlett, had on hand a plaster model of the statue which was greatly admired by all who saw it. The permanent statue, which is to be located in substantially the same place where the plaster model stood, is to be a bronze, and before long will be completed and ready to be erected. While the entire cost of the statue was underwritten by a small group of members, it is hoped that the whole expense will be met by small subscriptions from a large number of the Association. In order that everyone may have an opportunity to participate in this expression of the good will of the American bar towards our British brethren, notice is given that contributions should be sent in the near future to the undersigned at the address given.

GEORGE W. WICKERSHAM,
Chairman, Finance Committee,
Blackstone Memorial."

40 Wall Street, New York.

We take pleasure in indorsing to the full the suggestion of Mr. Wickersham that the Blackstone statue should be the gift of the American Bar to the Lawyers of England and not simply that of a comparatively limited group. The sum that remains to be raised to defray the expense of this magnificent production is comparatively small, and a very moderate contribution on the part of the members of the Bar will not only cover it but will also give the contributors the pleasure of personal participation in an international act of genuine significance. The statue is fully worthy of the subject, and when the present full-size model which was exhibited in the Hall of the Law Courts last summer, is replaced by a bronze cast, the monument will easily take its place among the objects of particular interest to Americans traveling in Europe.

While the movement to present this statue was primarily fostered and carried out by the American Bar Association, the committee in charge of the business, as well as the officers and a great number of members of the Association, felt that their actions might justly be taken as representative not only of the membership of the organization but also of the American Bar in its widest extent. The inscription, as we understand, will carry out this idea. Under these circumstances it is to be hoped that a way will be devised to bring the matter to the attention of American lawyers who do not happen to be members of the national association, with a view of enlisting their interest and giving them the opportunity to have a part in the gift. This of course can readily be done. Members of the Association have only to bring the subject to the attention of their local Bar Associations at their next regular meeting by making a brief statement of the object and widely representative character of the movement. Should they wish to refresh their minds as to certain details, they can readily refer to Mr. Wickersham's very interesting address at the presentation of the monument in London, printed in the August, 1924, issue of the Journal.

From a logical standpoint the appeal might readily be made even wider. In view of the immense part which the "Commentaries" played in crystallizing and defining the conceptions which now underlie our Federal and State Constitutions, in furnishing the colonists with a clearer idea of the rights which were theirs to defend and maintain, no patriotic American can feel himself exempt from obligation to the great Commentator. It does not matter that Blackstone himself had scant idea of the great service he was rendering to a nascent nation and its institutions—that he builded better than he knew, as many a man has done before him. The service is there, a matter of history, and everyone must recognize it. In the address of Mr. Wickersham just men-

tioned this aspect of Blackstone's significance for America and Americans is set forth with particular clearness. Of course there is no thought of extending the appeal to the wider public. But the patriotic significance of Blackstone's work may well reinforce the lawyer's desire to help in this tribute to a great member of his profession.

PREPARING FOR SUPREME COURT

The letter written to Justice McKenna on his retirement, and read from the bench by Chief Justice Taft, sums up very briefly the main outlines of a long and useful career. Previous to his appointment to the Supreme Bench, the retiring Justice had a long season of preparation for his life's crowning work—in active practice, in the halls of legislation, as a cabinet officer, on the bench. If one were to attempt to outline the preparation that would most fit a man to deal with the immense variety of problems that come before that august tribunal, it would be hard to suggest anything capable of giving him wider contacts and a better understanding of things than this discipline of actual professional and political life.

What we find in the case of the retired Justice is of course true also of all of his former associates. Careless lay critics of the U. S. Supreme Court, who speak of it as composed of gentlemen of a more or less monastic and exclusively legal cast of mind, without much contact with or understanding of things outside, really owe it to themselves to look up the careers of the men who constitute that tribunal. A mere glance at "Who's Who" will do to begin with. They will, we feel assured, realize what an immense body of experience in law, legislation, administration, politics and other relevant and important fields is represented by that Court. We make bold to say that there is no other official group of nine men in this or any other country which can equal them in this respect. The members have come to their present high positions as a result of success in the hard struggle of a professional life which touches the activities of men in organized society at almost all important points, and it is safe to assume that the knowledge thus obtained is not suddenly lost by their elevation to an exalted place.

Of course what the careless critics of the sort mentioned generally mean is that the U. S. Supreme Court has failed to decide some cases in the way in which, in their zeal and perhaps ignorance of law and the limitations of judicial action, they think it should have been decided. They thereupon promptly ascribe the decision to a lack of understanding of the great social currents of the time, and they picture life as beating vainly against an impregnable rock of judicial conservatism. It never seems to occur to the critics that the Justices have had an experience with life which makes them quite as good judges of social currents and needs as even the most enthusiastic advocate of change—perhaps even better judges of them. For social currents are by no means new phenomena in our national life. Above all, the critics seldom take into account the fact that the Justices are bound by the constitution and the laws of the land in making their decisions, and do not enjoy unfettered freedom to decide things as they want them to be.

As a sort of reply to this, it is suggested that, no matter how familiar the Justices may have been with general conditions during their earlier careers, they are generally appointed at a certain age, and this fact, added to the "cloistered" nature of their judicial occupations, withdraws them more and more surely from contact with social realities as contrasted with legal abstractions. Of this last assertion it may be said that it is a purely gratuitous assumption for which the evidence is distinctly lacking. Active participation in the work of the world's greatest tribunal, dealing with the most important questions that arise in the country, is not a cloistered life in any sense. It is on the contrary a life in which every important case is a window wide open on the world outside. As to the suggestion of age, it is a simple fact that we can seldom have learning and great experience in the law without it. And if a man of a certain age does not react as readily to the alleged social need of the moment as the propagandists wish, it may very easily be due to the fact that he has had experience with a number of similar situations in the past and understands quite well how evanescent and insignificant some of them really are.

CONTRIBUTIONS

The articles and letters in the JOURNAL are signed with the name or initials of the writers, and the Board of Editors assumes no responsibility for the views expressed therein.

PROTECTING THE PUBLIC: ENCROACHMENT OF SOCIAL LEGISLATION ON PRIVATE RIGHTS

Divergent Theories as to Scope of Governmental Activities—Facts Indicating Trend of Modern Legislative and Judicial Interpretation—The Growth of Social Legislation in Various Fields and Result upon Government and Society—Essential Liberties and Initiative of Individual Are Being Preserved*

By DWIGHT G. MCCARTY
Of the Emmetsburg, Iowa, Bar

WE hear much these days about the encroachment of governmental activities. There are many people who view with alarm the growing power of the federal and state governments and the increasing number of boards, bureaus and commissions with authority undreamed of a few years ago. These individualists stand solidly on the teachings and traditions of our forefathers and believe that the palladium of our liberty depends upon the constitutional right of personal liberty and free speech, the right to hold property and to be secure in the peaceful promotion of business and personal welfare. They insist that our democratic institutions are being undermined and that we are headed towards a paternalistic government. These conservatives denounce the curtailment of individual liberty and the encroachment of government activities upon private business.

On the other hand there are liberals who believe in constitutional rights, but insist that the public welfare and rights of society are paramount and that the rights of the individual must give way for the public good. They defend modern legislation and the liberal interpretation of the constitution as a social necessity and a logical development in constitutional interpretation.

We have, therefore, not only two opposing schools of thought and two divergent theories as to the scope of governmental activities, but we have two fundamentally different ideas of social control. On the one hand is the conservative and on the other the liberal. It is the age-old battle in its modern form. It presents one of the fundamental problems of society.

As lawyers and laymen, interested in American ideals and American citizenship, it is peculiarly appropriate that in this Lawyer's Chautauqua, we should consider this vital problem of American Life in its legal aspects.

If we go back to the beginnings of our government, we find that the binding obligation of contracts, the vested rights of property, and the personal religious, civil and political rights, are among the sacred guaranties of the constitution. These rights were the result of centuries of struggle for freedom. The very frame-work around which the whole constitution was built was the equal protection of the law and the provision that none shall be deprived of life, liberty or property, without due process of law. This principle is as inviolable as the constitution itself. And it is well that it is so. It has stood the test of time and will stand through the ages because it is fundamentally right. The constitution of the United States is as sound as the basis of our government and of our social structure as when framed in the convention at Philadelphia. Any assault on the Constitution is vicious and uncalled for. It is not necessary to go into the reasons for the vital strength and permanence of our constitution. That great document is adequate for all modern needs, with an occasional amendment where construction has been too narrow. We are concerned now rather with the matter of interpretation and construction.

It is my purpose tonight to consider briefly the main tendencies that indicate the trend of modern legislation and judicial interpretation.

At the outset we must keep well in mind the fact so often overlooked, that the fundamental rights of personal liberty and property, guaranteed by the constitution, while vitally necessary to freedom and happiness, are not absolute. These individual rights are subject to the correlative rights of the people. Under the police power, the government has an inherent power to enact laws within the constitutional limits to secure order and promote the safety, health, morals and general welfare of society.[1] This power is sovereign and has always been recognized. It corresponds to the right of self preservation of the individual. It has been appropriately referred to as a weapon for self defense, possessed by all governments. It is apparent, therefore, that this police power as an attribute of sovereignty, is founded on the duty of the state to protect its citizens and provide for the safety, good order and general welfare of the community.

A few well established examples will show how fully this general power predominates over the rights of the individual. Under eminent domain, private property may be taken for a public use upon just compensation being paid.[2]

Private property must yield to the public need. My house or land or your house or land may be

*Address delivered at Lawyers' Chautauqua at Emmetsburg, Iowa, June 25, 1924.

1. "The Power of the State . . . to prescribe regulations to promote the health, peace, morals, education and good order of the people." Barbier vs. Connolly, 113 U. S., 27 @ 31; Mugler vs. Kansas, 123 U. S., 623; Licensed Cases 5 Howard (U. S.), 504; Munn vs. Illinois, 94 U. S., 113. Compare also 4 Blackstone Comm., 162. "It is familiar law that even the privilege of citizenship and the rights inhering in personal liberty are subject in their enjoyment to such reasonble restraints as may be required for the general good." Mr. Justice Harlan in Holter vs. Nebraska, 205 U. S., 34 @ 42.

2. This right of *eminent domain* named from the latin by Grotius in the 17th century has from very early times been recognized as an inherent attitude of sovereignty. Grotius, De Jure Belli ac Pacis 1, 3, 6; II 14, 7. Kohl vs. U. S. 91 U. S. 367; Weber vs. Harbor Commissioners 18 Wall 57. The 5th amendment to the Federal Constitution provides, "Nor shall private property be taken for public use without just compensation." Many state constitutions have like provisions. However this is not important as the United States Supreme Court has held that taking property by the State even for public use without compensation is not due process of law under the 14th Amendment. C. B. & Q. Ry. vs. Chicago 166 U. S. 226. Nor is the taking of private property for private use due process of law. M. P. Ry. Co. vs. Nebraska, 164 U. S. 403.

taken even against our will if the space is needed for a railroad yard, public building, school, playground, park or similar public use, subject only to the limitations that the taking must be in a legal manner and for a just compensation. We all recognize that this is a legitimate function of government and that private rights must give way to the public good in these cases.

In establishing drainage districts, the reclaiming of the land is made necessary for the public health, convenience and welfare and the tiling and draining is done by legal proceedings without reference to the desire of the individual land owner.[3] The same is true of irrigation and reclamation projects.[4]

The taxing power is also a sovereign right of the state which transcends the rights of the individual.[5]

Private property may be taken or destroyed under some circumstances without any liability for compensation. In case of a conflagration, firemen may dynamite private property if necessary to stop the progress of the flames.[6]

The passing of prohibition laws often rendered saloon and brewery property entirely useless and a total loss. The storing or use of dangerous explosives, firearms, or fireworks may be prohibited in populous places.[7] Factories or other buildings that give out offensive smoke, odors, gases, noises, etc., may be abated as nuisances or closed.[8] Common barberry may be eradicated from our lawns and farms,[9] diseased cattle may be killed,[10] orchards with dangerous infections may be cut down,[11] and rigid quarantine may be established to prevent the spread of infectious and contagious diseases.[12] Carrying of concealed weapons may be prohibited,[13] and all sorts of police regulations to secure the public safety may be enforced.[14]

Drivers in the street or on the highway must observe traffic rules regardless of their personal preference.[15] Shooting game or catching fish out of season is prohibited no matter how much the individual may wish to enjoy the sport at that time.[16]

The individual has the right to make contracts and this right is a right which the Constitution and the law hold inviolate. But this right is not absolute nor is the right to enforce such contracts untrammelled. There are certain contracts which will not be enforced for anybody, because they are illegal, or against Public Policy.[17]

Liberty of speech and of the press is guaranteed under our free government, yet that right is not absolute or unlimited because it is limited by the law of slander and libel.[18]

Many other instances might be cited, but these are enough to show that the liberty of the individual and his property rights, have already been circumscribed by certain limitations. Are these limitations the oppression of a tyrant? Are they an indication of the decay of our ancient landmarks, or that the faith of our fathers is being impaired? No, on the contrary, these are recognized functions of a free government that protects its citizens not only from foreign aggressions, but from the dangers and contaminations of their fellow citizens. They show that the liberty of the individual has always been somewhat circumscribed in the interest of the many. This is law and order. This is truly responsible government.

But the conservative individualist insists that these powers are broad enough, and that any extension beyond these recognized time-tried limits is a menace to democracy. But these limitations have always been changing. As society becomes more complex, there must inevitably be an increase in the circumscribing factors on the individual. New conditions bring new problems and new need for further restraints.

The laws must change to meet the new situations. What was sufficient for the old is inadequate for the new. But through all this great mass of growing laws, it is evident that the public welfare is more and more becoming the controlling factor in working out these new problems. As the free bridge follows the toll bridge, the railroad the stage coach, the telephone and the telegraph the news courier, the high power transmission lines and interurban the more primitive utilities, the automobile the carriage, and now the airplane and the wireless; so successive stages of industrial progress have been met by a growing and expanding law. The fundamental principles are the same, but the application to new questions has, from the very force of circumstances introduced new factors. Government, must of necessity, expand and enlarge its facilities to deal with this modern development. These developments are viewed with alarm by those who fear governmental encroachments. But we must clearly differentiate between proper governmental functions and the unlawful impairment of absolute rights guaranteed to the

3. Mamgault vs. Springs 199 U. S. 473; New Orleans Gas Light Co. vs. New Orleans Drainage Comm. 197 U. S. 453; Matter of Drainage of lands 35 N. J. 497. Hatcher vs. Board of Supervisors 165 Ia. 197, 145 N. W. 13.

4. Fallbrook Irr. Dist. vs. Bradley 164 U. S. 112; Paxton Irrigation Co. vs. Farmers Irrigation Co. 45 Neb. 884; In re: Irr. Dist. 117 Cal. 382, 49 Pac. 354.

5. McCulloch vs. Maryland 4 Wheat 316; Meriwether vs. Garrett 102 U. S. 472.

6. Mouses Case 12 Coke 63; Stone vs. New York 25 Wend 157; White vs. Charleston 2 Hill (S. C.) 571; Suroceo vs. Gary 3 Cal. 69; Dunbar vs. San Francisco 1 Cal. 355; Taylor vs. Plymouth 8 Met. 462; American Print Works vs. Lawrence 21 N. J. 248, 23 N. J. 590; Chicago vs. Jackson 196 Ill. 496, 63 N. E. 1013; McDonald vs. Red Wing 13 Minn. 38; Baumgartner vs. Hasty 100 Ind. 575; Keller vs. Corpus Christi 50 Tex. 614; Hale vs. Lawrence 21 N. J. (law) 714. See Cooley's notes to 1 Bl. Comm. p. 139-140 and Street Foundations of Legal Liability I p. 23.

7. See cases collected in 12 Corpus Juris 917, Note I. As a Nuisance, Booth vs. Rome Co. 140 N. Y. 267, 35 N. E. 592; Chicago Co. vs. Glass 34 Ill. App. 364; Tynor vs. Peoples Gas Co. 131 Ind. 408, 31 N. W. 61; Flynn vs. Buttler 189 Mass. 377, 75 N. E. 730.

8. 29 Cyc. 1185-1187. As to Slaughterhouses: Rhoades vs. Cook 122 Iowa 336, Reichert vs. Geirs 98 Ind. 73, Minke vs. Hapeman 87 Ill. 450. Even cooking onions and cabbage may become a nuisance. Shroyer vs. Campbell 31 Ind. App. 83, 67 N. E. 193.

9. Iowa Code Supp. 1913 Sec. 2575 a 48; 38 G. A. Chap 8, sec. 1.

10. 26 U. S. State at Large 414 C 839 Sec. 8. Houston vs. State, 98 Wis. 486, 74 N. W. Ill.; Neward vs. Hunt 50 N. J. L. 308, 12 Atl. 697. Iowa Compiled code Sections 1736, 1740, 1758, 1767. Waud vs. Crawford 160 Iowa 432, 141 N. W. 1041.

11. See Note 9.

12. New York vs. Miln 9 Peters (U. S.) 102; Morgan, etc., vs. Louisiana Board of Health 118 U. S. 455. A law excluding cattle liable to have anthrax was held constitutional. Smith vs. St. Louis etc. Ry. 181 U. S. 248.

13. Salina vs. Blakesley 72 Kan. 230, 83 Pac. 619; 7 Ann. Cases 925.

14. Barbier vs. Connolly 113 U. S. 27; Hannabel vs. Hansen 95 U. S. 465; State vs. Schlenker 112 Ia. 642, 84 N. W. 698.

15. 29 Corpus Juris 649-650. This is now very generally regulated by statute.

16. See cases collected and considered in Art. on "Game," 27 C. J. 945.

17. Williston on Contracts Vol. 3 Secs. 1628-1796, Chicago et. Ry. vs. Wabash etc. Ry. 61 Fed. 993.

18. "Our present law permits anyone to say, write and publish what he pleases; but if he makes a bad use of this liberty, he must be punished." Odgers, Libel & Slander (1st Ed.) 12. "There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty or property. It is one of those rights necessary to human society that underlies the whole social scheme of civilization." Park vs. Detroit Free Press, 72 Mich. 560, 40 N. W. 731@733.

individual. Unless fundamentally those rights are being impaired, there is no cause for concern.

Before discussing further the question of our changing legal conceptions as developed by the new order, it is necessary to trace these tendencies along other lines and consider some modern social conditions in the light of illustrative cases.

The growth of *Social legislation* is one of the momentous facts of modern life. What is the result upon government and society? A brief survey of this development will give us the fact premise upon which to base a conclusion.

The first definite evidence of public regulation and control was in the domain of *Public Callings*. Any consideration of the subject must of necessity start from that beginning. It has long been the law that certain classes of business are public. Very early in the English law, an inn-keeper was held to be a public calling so also were ferrymen, wharfingers, freighters and others who held themselves out to serve the public.[19] Later the law developed until the modern law of public calling became fixed and definite.[20] Public utilities such as railroads, telegraph and telephone companies, waterworks, gas and electric light concerns, by their very nature are public callings as they have a monopoly and public regulation is necessary corollary to the granting of the franchise.[21] If I want an electric light in my home or a telephone in my office, there is only one company to whom I can go to procure such service. Those companies have a franchise and right to use the public streets for their poles and wires. If I tender to them the reasonable charge for the service which they are rendering others for the same price, they must give me the same. If they arbitrarily refuse, I can go into court and compel them to give me such service. It is the obligation of a public calling,—to serve all, with adequate facilities, for reasonable compensation, without discrimination.[22] On the other hand, if I go to a grocery store to buy a pound of coffee, or into a hardware store to buy a hammer, the merchant can refuse to sell to me for any personal reason or for no reason at all. These are private businesses and they have no legal obligations to sell to everyone and I have no legal redress for their refusal. There are other grocery stores and hardware stores and if I should prove to be excessively unpopular—there are mail order houses that are perfectly willing to take my money. These examples illustrate the fundamental difference between the law of a private business and a public calling. There are, of course, many ramifications, but they do not affect the application to our present subject. The significant fact is that during recent years more and more businesses have been added to those designated as public callings. The famous case of Munn vs. Illinois (94 U. S. 113) decided by the Supreme Court of the United States in 1876, did more than declare an elevator for the storage of grain a public business—it laid down in definite terms the law of public interest. Mr. Chief Justice Waite, who delivered the opinion of the Court, clarified the law by these oft-quoted words, "Property does become clothed with public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created."

The regulation of public utilities and public callings, is a well developed branch of our law founded on sound policy and sound legal principles.

Closely connected with this question is the long struggle of the government to secure adequate regulation of the railroads and industrial trusts. We have only to turn back to our history to find the beginnings of these modern conditions. The problem of *Monopoly* loomed large in the seventies and eighties, when the oil trust was definitely extorting rebates and favorable rates from the railroads, and ruthlessly crushing out competition by its monopoly methods. Other big interests attempted the same practices until the Federal Government in 1886 created the Interstate Commerce Commission for the purpose of preventing rebating and equalizing railroad rates among shippers. This was the entering wedge and from time to time new legislation has given the Commission more power to cope with new abuses. It was an extension and enlargement of the public calling regulation. The big manufacturers and producers by combination and consolidation became bigger and more powerful with less and less competition until to remedy this menacing evil, the Sherman Anti Trust Act was passed in 1890. This act has been gradually applied to more and more classes of abuses and has been in the main effective in restraining major monopoly abuses. The more recent Clayton Act and Federal Trade Commissions Act have expanded this power so that today the regulatory right of the government in this field is well recognized and in general obeyed as well as can be expected in a changing, growing, complex industrial situation which continually brings up new untried problems. It is not my purpose to go into these questions as they are matters of history, but rather to consider the modern development of these early attempts at government control.

The regulation of the manufacture and sale of food products has become very prevalent during the last few years. This sort of legislation has been upheld in every case where it is a reasonable regulation with a view of preserving health or preventing fraud. The Federal Pure Food and Drugs Act passed in 1906, has has a wide application in forbidding the inter-state shipment of any article of food, adulterated or misbranded. The state statutes have also taken a wide range in covering a great many articles of food. For instance the oleomar-

19. Jackson vs. Rogers (Kings Bench 1683), 2 Shower 327 and other early cases in Beale & Wyman, Cases on Public Service Companies.

20. Munn vs. Illinois 94 U. S. 113. There has been a great mass of decisions, since the Munn case, developing the extent of this regulation and its reasonableness. See Roses notes to Munn vs. Illinois. "The evolution and diminution of Munn vs. Illinois," 62 Am. St. Rep. 289, 292, Note Budd vs. New York 143 U. S. 547; Simpson vs. Shepard 230 U. S. 413. A few cases will illustrate the growth in recent years. *Taxicabs* are common carriers, Terminal Taxicab Co. vs. Kutz, 241 U. S. 254, Ann Cases 1916 D. 765; as are *Oil Pipe Lines*. Prairie Oil Co. vs. U. S. 204 Fed. 909; U. S. vs. Ohio Oil Co. 234 U. S. 565; and *moving vans* Lawson vs. Connolly 175 Mich. 377, 141 N. W. 624. *Stockyards* are public callings. Rotcliff vs. Wichita Union Stockyards 74 Kan. 7, 86 Pac. 159; U. S. vs. Union Stockyards etc. Co. 226 U. S. 286; also *Refrigeration warehouses*, State etc. vs Monarch Ref. Co. 267 Ill. 534, 108 N. E. 718. The *censorship* of *moving picture films* is valid regulation. Mutual Film Co. vs. Industrial Comm. 215 Fed. 144; Dreyfus vs. City of Montgomery 4 Ala. App. 274, 51 South 355.

21. Davenport etc. Co. vs. Davenport 124 Ia. 22, 98 N. W. 802. People vs. Peoples Gas etc. Co. 205 Ill. 482, 68 N. E. 950. Ludington etc. Co. vs. Ludington 110 Mich. 480, 78 N. W. 558. Western Union Tel. Co. vs. New York 38 Fed. 558. State vs. Kinlock Tel. Co. 93 Mo. App. 258, 67 S. W. 686.

22. Beale & Wyman, Cases on Public Service Companies, Chapter II.

garine cases.[23] Oleomargarine when properly made is a wholesome food product, and by the great weight of authority the laws only prohibit the selling of oleomargarine as butter or by coloring it, or so labeling it as to deceive buyers into believing it is real butter. Most laws require the substitute to be plainly so marked. The Armour Packing Company was convicted of selling a product in imitation of butter, and the Supreme Court of Iowa in 124 Iowa, 323, affirmed the conviction, on the ground that the statute was one of regulation for the prevention of fraud and within the power of the legislature.

Another good illustration is the recent case of Hutchinson Ice Cream Company vs. Iowa decided in the Supreme Court of the United States, in which the Iowa law prohibiting the sale of ice cream unless it contained not less than 12% of milk fat and was made from pure, wholesome sweet cream, was upheld.[24] It was contended in that case that ice cream was a generic term embracing a variety of products many of which did not contain any dairy cream whatever. Mr. Justice Brandeis, speaking for the court, said, that very fact may well have led the legislature to believe that the public welfare required that restraint in order that the ordinary purchaser at retail, may know when he purchases ice cream, that cream or rich milk is among the important ingredients and that butter fat is the principle food value therein. The law is designed to prevent persons from being misled and such laws are a proper exercise of the police power.

In the same way, federal and state laws forbid the shipment or sale of eggs that are decomposed or otherwise unfit for food;[25] regulate the standard and quality of milk and butter;[26] punish the sale of meat, falsely represented as "kosher";[27] prohibit the use of sulphur, boric acid or benzoate of soda or any unwholesome coloring matter in food products;[28] prohibit the sale of veal as food, from a calf not the proper age for that purpose;[29] require the wrapping of loaves of bread in paper before sale;[30] compel the proper labeling of proprietary foods and syrups;[31] and so on down the long line of restrictions to prevent adulteration, misbranding and deception in the marketing of food products. Not only have these regulations covered a wide field, but they have required an army of Boards, Commissions, Bureaus, Administrative officers and inspectors, to see that these provisions are enforced. This is one of the government activities that provokes the loudest criticism from those who decry the paternalistic trend in government affairs. And yet when it comes down to actual facts, how many of us would be willing to wipe these laws from the statute books, discharge those engaged in enforcing them, and leave the unwary public at the mercy of any unscrupulous manufacturer and purveyor of food products. Are we willing to take that chance? Even at the price we pay, few would now be willing to turn back, submit the people to the unequal contest, and compel the consumer to take all the risk in the buying of adulterated, misbranded and impure foods? There is sound public policy and real public service back of this pure food legislation.

An outstanding example of new social legislation is the workmen's compensation laws. The State of Washington in 1910 passed the first act that succeeded in securing the sanction of the Courts.[32] Several other states passed acts at about the same time. Some of these were experimental, and some weak and impractical, but the principle was sound and spread rapidly from state to state. Under the common law if a workman was injured in the course of his employment his employer was liable only if it could be proved that the injury was due to the employer's negligence. There were also "assumed risk," "fellow servant" and "contributory negligence," defenses available to defeat the award of damages. Thus the injured workman was put to an expensive and uncertain law suit to secure damages for his injury.

Congress in passing the Federal Employers Liability Act prescribed the liability of certain employers engaged in interstate commerce when their employees are injured as the result of *negligence*. Negligence is the basis of liability in the Federal Act, and evidently leaves the field of compensation for industrial accidents entirely to the various states. The Federal Act is however exclusive in Interstate Commerce.[33]

Compensation is based upon the broad fact that in industrial business with its machines and complicated physical organization the large percentage of injuries are not due to any *fault*, but result from the risks of machine operation. The new idea of the Workmen's Compensation Acts was to pay the injured man "Compensation" instead of "Damages" and pay it to him regardless of who was at fault. The acts set out a schedule of the amount to be paid usually based upon the wages received. The length of time of payment depends upon the seriousness of the injury. Generally the doctor bill up to a certain maximum was also paid. Some form of insurance or accident indemnity was provided by these laws to finance the payments for those employers not electing to carry their own risks, and various forms of state Boards or Commissioners were entrusted with the duty of enforcing the Acts. This is social service legislation of a high type. Instead of the poor injured workman being compelled to fight an uneven fight for damages, he is promptly paid the cost of his medical assistance and he continues to receive a substantial

23. Powell vs. Penn, 127 U. S. 678, Plumley vs. Mass, 155 U. S. 461, Collins vs. New Hampshire 171 U. S. 30. The New York Statute absolutely prohibiting sale of oleomargarine, held unconstitutional in People vs. Marks, 99 N. Y. 377, 2 N. E. 29, later statutes sustained as preventing fraud in People vs. Arnesberg, 105 N. Y. 123, 11 N. E. 277. See 36 C. J. 755, Sec. 6; 3 Ann. cases 451, Note; 17 Ann. cases 1100; Ann. cases 1913, 413; 6 A. L. R. 429.

24. 242 U. S. 153, affirming State vs. Hutchinson Ice Cream Co. 168 Ia. 1.

25. Hipolite Egg Co. vs. U. S. 220 U. S. 45; U. S. vs. 13 crates of frozen eggs 208 Fed. 950 (Aff. 215 Fed. 584); U. S. vs. Two Barrels of Dessicated Eggs 185 Fed. 302.

26. State vs. Schlenker 112 Ia. 642, 84 N. W. 698; Hebe Co. vs. Shaw, 248 U. S. 297; People vs. Vandecar 199 U. S. 532 (Affirming 175 N. Y. 440, 67 N. E. 913).

27. People vs. Atlas 183 App. Div. 595, 170 N. Y. S. 834.

28. Price vs. Ill. 238 U. S. 453 (boric acid); People vs. Hinshaw 135 Mich. 278, 97 N. W. 758 (coloring); Commonwealth vs. Pflaum 236 Pa. St. 294, 84 Atl. 842 (sulphur); Curtice vs. Barnard 209 Fed. 586 (benzoate of soda); People vs. Spencer 201 N. Y. 105, 94 N. E. 614 (coloring vinegar).

29. People vs. Dennis 114 N. Y. 7; People vs. Bishop 106 App. Div. 266, 94 N. Y. S. 778.

30. State vs. Normand 76 N. H. 541, 85 Atl. 899; Ann. Cases 1913 E. 996.

31. McDermott vs. Wis. 228 U. S. 128 (corn syrup); Corn Products Ref. Co. vs. Eddy 240 U. S. 427 (affirming 99 Kan. 63, 163 Pac. 615).

32. State vs. Claussen 65 Wash. 156, 117 Pac. 1101. See also State vs. Mountain Timber Co. 75 Wash. 581, 135 Pac. 645; (affirmed by U. S. Sup. Ct. 243 U. S. 219).

33. New York etc. Ry. Co. vs. Winfield (1917) 244 U. S. 147; Ross vs. Schooley 249 U. S. 615; New York Cent. Ry. vs. Porter (1919) 249 U. S. 168. Nor can the interstate carrier be put to an election between the provisions of Federal or State Act. Erie Ry. Co. vs. Winfield 244 U. S. 170. An exhaustive note as to the application of the Federal Employers Liability Act will be found in 12 A. L. R. 693-718.

part of his weekly wage during his disability. Instead of society losing a producer and acquiring a disabled non-producer and perhaps even a public charge, the industry as a whole assumes the burden of the injury, the cost of which merges in the overhead. The burden is taken off of the injured worker and his family and placed on the industry and spread out so that it is easily borne by society generally.

However the new legislation was fiercely attacked from all sides. One writer in a law magazine[34] stigmatized the New York Act, as attempting to supply a guardian for freemen, to dole out a pittance to them as wards of the state, and thus deprive them of the rights of citizenship to enforce their rights in court.

The President of the Indiana State Bar Association, in his address in 1910, referring to the Workmen's Compensation Act said, "Lawyers will agree that such a plan, when compulsory, would be in violation of the Constitution of Indiana. It takes the property of the employer when he is not in fault and gives it to the employee without due process of law. It deprives both employer and employee of the right of trial by jury in cases where such right existed at the time the constitution of Indiana was adopted. It deprives both employer and employee of their freedom of contract."[35] These criticisms are typical of the hue and cry that went up all over the country against the new acts. In New York the Court of Appeals in 1911 in the Ives Case held the Workmen's Compensation Law of that state unconstitutional.[36] The Court could not accept the possibility that under that act an employer might be compelled to pay compensation to an injured employee even though the employer was without any fault or negligence whatever. The Ives case rested on the theory that the only "due process of law" was the old common law standard of care of the "ordinary prudent man." It overlooks entirely the inherent power of the state to substitute "compensation" for "liability" in the interest of society. The state is under a social obligation to protect its injured workmen and it is a decided advance when that protection takes the form of adjusted and certain compensation instead of the slow, costly and uncertain trial of a personal injury suit in court.

These laws spread rapidly from state to state. There was a practical need for this sort of legislation and the results were decidedly favorable to its adoption. In a few states the acts were first held invalid, but the trend soon went the other way. Three decisions of the United States Supreme Court, one approving the compulsory act of New York, one sustaining the Iowa elective law and one upholding the Washington state insurance fund act, completely and conclusively settled the constitutionality of this kind of legislation.[37] By 1918 every act passed by state legislatures had been upheld as constitutional. The policy of the states in passing these Acts is well expressed by the Wisconsin Court in upholding the law of that state.[38] The court says: "This problem is distinctly a modern problem. In the days of manual labor, the small shop, with few employees, and the stage-coach, there was no such problem, or, if there was, it was almost negligible. Accidents there were in those days, and distressing ones; but they were relatively few, and the employee who exercised any reasonable degree of care was comparatively secure from injury. There was no army of injured and dying, with constantly swelling ranks marching with halting step and dimming eyes to the great hereafter. This is what we have with us now, thanks to the wonderful material progress of our age, and this is what we shall have with us for many a day to come. Legislate as we may in the line of stringent requirements for safety devices or the abolition of employer's common law defenses, the army of the injured will still increase, and the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common law, personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty." This sort of public policy is sound, and it is no wonder that now practically every state in the Union has a Workmen's Compensation Act in successful operation.[39]

This is a remarkable illustration of the rise and triumph of this kind of social legislation. A few decades ago it would have been considered revolutionary, yet in the space of eight years, workmen's compensation became a part of our industrial and governmental system and received the stamp of legal validity by the highest courts of the land. It is rather significant that the fears and dire threats of disaster from this sort of legislation have entirely failed to materialize and in actual practice the laws have worked out not only to the great benefit of the workmen but to advantage of the employer as well. A new spirit of co-operation is growing between labor and capital in this field that is helping to reduce the vocational hazards and eliminate preventable risks. It is to the interest of both that these humanitarian principles be encouraged and carried out. Society has been the gainer and it is gratifying that the law so soon put its stamp of approval on this type of forward looking legislation and thus effectively aided social progress.

Old age pensions have been enacted in several states[40] but the constitutionality of these acts have not yet been squarely presented to the courts. The Arizona Act of 1915 was declared unconstitutional by the Arizona Court because it was indefinite and impractical.[41] The court particularly condemned the provision of the law which abolished all almshouses but left several classes of needy people who would not come within the pension class. The decision invalidated that particular statute but the constitutionality of old age pension legislation in general was not considered. It will not be many

34. "Workmen's Compensation and Equality," Law Notes, Aug., 1914, Page 86.
35. Case and Comment, Sept., 1910, Page 198.
36. Ives vs. South Buffalo Ry. Co. 201 N. Y. 271, 94 N. E. 431.
37. New York Central vs. White 243 U. S. 188 (New York); Hawkins vs. Bleakly 243 U. S. 210 (Iowa); and Mountain Timber Co. vs. Washington 243 U. S. 219 (Wash.). Reported also in Ann. Cases 1917 D. 629-650.
38. Bergnis vs. Falk Co. (Wis.) 133 N. W. 215.
39. The cases on the Constitutionality of Workmen's Compensation Acts are collected and annotated in Ann. Cases 1912B, 174-179; Ann. Cases 1915 A. 247; Ann. Cases 1916 B. 1286-1290; Ann. Cases 1918 B. 611-615. This last annotation is a complete summary of the final state legislation and cases approving all the acts in the United States.
40. Arizona 1915; Nevada, Montana and Pennsylvania 1923, Am. Bar Ass'n Journal Feb. 1924, page 109.
41. Board of Control vs. Buckstegge 18 Arizona 277.

years before a practical system for this type of legislation will be worked out and this too will then become general as the theory of this type of social amelioration is undoubtedly sound.

Another example is the so-called "Service Letter" enactments which have recently been under fire. Several states passed laws requiring employers to furnish any dismissed employee with a letter giving the reasons for the discharge. This was intended to combat the evils of a custom that had grown up among railroads and other corporations of making inquiry of the former employer and giving or refusing employment on the strength of that information, thus arbitrarily working a great injustice and oppression upon large numbers of wage earners.

In spite of some adverse state decisions,[42] the United States Supreme Court sustained these laws as applied to corporations in the case of Prudential Insurance Company vs. Cheek (259 U. S. 530)[43]. The Court says, "What more reasonable than for the legislature of Missouri to deem that the public interest required it to treat corporations as having in a peculiar degree the reputation and well-being of their former employer in their keeping, and to convert what otherwise might be but a legal privilege or, under prevailing customs, a 'moral duty' into a legal duty by requiring as the statute does, that when an employee has been discharged or has voluntarily left the service, it shall give him, on his request, a letter setting forth the nature and character of his service, and its duration; and truly stating what cause, if any led him to quit such service." Thus again is a social duty impressed upon a corporation.

These cases present a very nice question. If employers can legally be compelled to give service letters, then they can legally be compelled to submit to many other requirements which will gradually whittle down the right of freedom to hire and fire at will until there is little left. However, it is doubtful if this requirement will ever be extended to individuals, and if confined to corporations only it may be defended because of the public interest in preventing corporations from unjustly using their power to harm their employees.

Another line of cases which illustrates the changing point of view is the law of *industrial disputes*. There has been a constantly increasing volume of cases involving strikes, lockouts, picketing, boycott and other questions growing out of the attempts of labor unions to enforce the growing power of labor. On the one hand, the employer has the vested right to conduct his lawful business without molestations or interference and the right, which the law protects, to employ or discharge whom he pleases as long as he violates no contract right of employment.[44] On the other hand, the labor Unions have a right to organize for mutual benefit and other lawful purposes, the right to work or cease to work, to strike if they consider necessary, and to use all peaceful means to inform and interest others in their cause.[45] The right of labor to organize is as legal as the right of the employer to incorporate.[46] This presents the industrial contest, the warfare over conflicting rights. How far either side can go in asserting its own rights is the question. No precise line can be drawn as the cases vary greatly according to the actual facts and the predilection of the particular court. Of necessity this is so, because between employer and employee there is a clash of conflicting rights. But when the rights of the public intervene, then the lines becomes plain. No one can read the recent labor decisions without realizing that the protection of the rights of the public is gradually but clearly becoming the criterion in regulating the struggle between capital and labor. Combatants may wage their warfare as long as the innocent public are not thereby prejudiced or injured. In the words of Justice Brandeis in the Duplex Printing Company case,[47] "Above all rights, rises duty to the community." This decided tendency in industrial controversies is in line with other social developments of the day, and unquestionably will produce in time far-reaching results.

Occasionally there are setbacks in the forward march of social legislation as for instance the recent decision of the Supreme Court of the United States in the case of Adkins vs. Childrens Hospital (261 U. S. 525) decided April 9, 1923, in which the *minimum wage law* for women of the District of Columbia was held unconstitutional as invading the constitutional right of contract and on the ground that a woman of mature age sui juris under the Constitution, cannot lawfully be subjected to restrictions upon her liberty of contract, which cannot be lawfully imposed upon men under similar circumstances. Chief Justice Taft, Mr. Justice Sanford and Mr. Justice Holmes, dissented. As Mr. Justice Holmes said in his dissenting opinion: "The power of congress seems absolutely free from doubt. The end—to remove conditions leading to ill health, immorality and deterioration of the race—no one would deny to be within the scope of constitutional legislation. The means are means that have the approval of congress, of many states, and of those governments from which we have learned our greatest lessons."

Minimum wage legislation is, of course, in its infancy and is still crude and oftentimes subject to the criticism upon which this case was decided, but like the workmen's compensation, and other social legislation of a like type, it is bound to come. Because it is founded on a great social need, it will be worked out so as to eventually become a part of the economic and social system of this country.[48] I am free to predict that its legal history will

42. Wallace vs. Georgia Ry. Co. 94 Ga. 732, 22 S. E. 579; Atchison, etc. Ry. vs. Brown 80 Kan. 312, 102 Pac. 459; St. Louis, etc. Ry. vs. Griffin 106 Tex. 477, 171 S. W. 703; Opinion of Justices 220 Mass. 627, 108 N. E. 807; The laws were upheld in Missouri and Okla. Cheek vs. Prudential Ins. Co. 192 S. W. 387 (Mo.); Dickinson vs. Perry 75 Okla. 85, 181 Pac. 504.

43. In addition to the Cheek case from Missouri (259 U. S. 530), the Court also upheld the Oklahoma law, C. R. I. & P. Ry. vs. Perry 259 U. S. 548.

44. Adair vs. United States 208 U. S. 161; Coppage vs. Kansas, 236 U. S. 1.

45. Gompers vs. Buck Stove & Range Co. 221 U. S. 418. See also cases cited in preceding note and also following note. But these rights must always be exercised with reasonable regard for the conflicting rights of others. Hutchman Coal Co. vs. Mitchell 245 U. S. 251, Brennan vs. United Hatters 73 N. J. L. 729, 65 Atl. 165, 9 Ann. Cases 698.

46. Hitchman Coal Co. vs. Mitchell 245 U. S. 251; Auburn Draying Co. vs. Wardell 227 N. Y. 1, 124 N. E. 97; Local Union vs. Strathakis, 135 Ark. 86, 205 S. W. 450.

47. Duplex Printing Co. vs. Deering 254 U. S. 443.

48. The cases are annotated in 12 A. L. R. 1216-1226 and 24 A. L. R. 1259-1262. This legislation has been upheld in many decisions. As to the very narrow margin of defeat in the U. S. Supreme Court, by reason of change of personnel see Powell, "The Judiciality of Minimum Wage Legislation," Harvard Law Rev. March 1924, page 541-573. For the economic and social justification of the minimum wage see the Brief of Felix Frankfurter in the Oregon case. Justice Brandeis having been disqualified the case was affirmed by an equally divided court (1917), Stettler vs. O'Hara 243 U. S. 629 (memorandum opinion only) on appeal from Oregon.

parallel the history of workmen's compensation and other like laws. To some of my hearers this may seem like extreme radicalism, but I am sure it is no more radical than much of the legislation that has already been accepted and upheld and which is working a wondrous change in our social system. We must break away from artificial rules and look to the social need.

Another notable example of this same kind is *Child Labor Legislation*. The Federal Supreme Court recently held the Child Labor Tax Law[49] and the Future Trading Act[50] unconstitutional on the ground that the imposition of a tax upon child labor or upon the sale of grain for future delivery with heavy penalties for their enforcement by the Federal Government gives Congress complete control over such business and opens the door to complete domination over a great number of subjects of public interest by congress by means of taxation which would be an invasion of the powers of the states reserved to them by the Constitution. This is plainly right for whatever our ideas may be regarding the advisability of child labor and grain futures legislation, such regulation should not be permitted under the guise of a punitive tax. As Chief Justice Taft said in the child labor case, "To give such magic to the word 'tax' would be to break down all constitutional limitations of the powers of congress and completely wipe out the sovereignty of these states." Once started on such a course, there would be no limit, and all constitutional safeguards would be of no avail to the individual and his business. Verily the power to tax is the power to destroy.

Two such laws have been declared unconstitutional and both on somewhat similar ground.[51] Because some of the Southern States refuse to enact laws against child labor in their cotton factories, or other states refuse for other local reasons, this condition of affairs, no matter how regrettable, does not give congress the right arbitrarily to mulct the employer by heavy penalty taxes in the endeavor to prevent the abuse. But state supervision is plainly inadequate and it is necessary to have federal control to get the necessary results. This can be secured directly by a constitutional amendment.

In fact the present Congress just before adjournment proposed a constitutional amendment permitting Congress to "limit, regulate and prohibit the labor of persons under 18 years of age," which amendment will now be submitted to the legislatures of the states and if ratified by 36 states will become a part of the constitution. There is every reason to believe that this child labor amendment will be ratified, in spite of organized opposition from selfish interests, and in spite of the resistance of conservative people who fear the power is too great. The deplorable condition of children in industry is a national disgrace, and we must not take counsel of our fears, but strike at once this manifest abuse, and trust that in proper time sufficient safeguards will be worked out as needed to tully protect legitimate spheres of youthful activity.

Other examples of extreme social legislation come to mind, which are so well known as not to need extended discussion. We may refer to the Harrison Drug Act, under which the Federal Government is pursuing and prosecuting the dope peddlers in their nefarious business, the country over; the Mann Act aimed at White Slavery which provides heavy punishment for transporting women from state to state for immoral purposes; and the Volstead Act which, sanctioned by the 18th Amendment, places America in the forefront among the nations of the world in the prohibition of the manufacture and use of intoxicating liquor with all its train of immoral, criminal and anti-social abuses. These enactments have been upheld as constitutional and within the police power of the state, and take high rank as needed social reforms.

(*Concluded in February issue*)

49. Bailey vs. Drexel Furniture Co. 259 U. S. 20.
50. Hill vs. Wallace 259 U. S. 45.
51. The Child Labor Act of 1916 excluding child labor made goods from interstate commerce was held unconstitutional in Hammer vs. Dagenhast 247 U. S. 251. Justices Holmes, McKenna, Brandeis and Clark dissented.

War Memorial to Denver Lawyers

A bronze tablet in honor of the Denver lawyers who gave their lives in the late war has been placed in the library of the Colorado Supreme Court. It is the gift of Miss Mary Lathrop, a member of the Denver Bar and also of the American Bar Association. Miss Lathrop has also presented to the Denver Bar Association a bronze tablet containing the names of the Denver Lawyers who served in the world war, and this is to be hung on one of the walls of the first floor of the courthouse. The Denver Bar Association, in accepting the gift, passed the following resolution:

"With deep appreciation of her patriotic motives, the Denver Bar Association receives from Mary F. Lathrop, one of its members, the bronze in honor of the Denver lawyers who served their country in the great war, 1917-1918. By this memorial she has fittingly honored, not only those whose names are enrolled upon it, but herself as well.

"To her devotion to her country's cause during the war she has added this evidence of enduring regard and gratitude for the supreme service which is thus commemorated.

"We pledge ourselves to see that this memorial finds suitable and permanent location in the courthouse of Denver, where it may always bear witness, not alone to the lawyer's loyalty to his country and her institutions in war as in peace, but to his recognition of the great principles of right and justice for which the nation fought in the great war."

New Orleans Bar Association

"The New Orleans Bar Association which completed organization last Friday avows its purpose to face these issues squarely. Its leaders pledge the new organization to militant support of fit judges and candidates for judgeships, and no other. There is promised likewise a vigilant and fearless campaign against the shady practice of lawyers whose misconduct has earned disbarment.

"This program is of direct interest to laymen. Its accomplishment would be welcomed by all good citizens. Its success would silence one of the commonest lay criticisms of the legal profession, and the one that reputable lawyers find it hardest to meet under prevailing conditions. Finally, the successful completion of that program will promote the general public welfare by bringing about a better and more efficient administration of justice." —*The N. O. Times and Picayune.*

REVIEW OF RECENT SUPREME COURT DECISIONS

False Financial Statement as Bar to Discharge in Bankruptcy—Exemptions Allowed a Bankrupt—Compensation and Penalty in 1916 Income Tax Act—Director General's Immunity from Suit Under Federal Control Act—Liability of Corporations for Erroneous Issue of Stock—Panama Courts Must Construe Statutes by Principles of Common and not Civil Law—Finality of Decisions of Director of Veterans' Bureau—Trading with Enemy Act—Employers' Liability Act, etc.

By Edgar Bronson Tolman

Bankruptcy,—Discharge, False Statements

A false financial statement as a basis for obtaining credit is a bar to a discharge in bankruptcy; the bankrupt cannot urge that due to lapse of time and extrinsic circumstances the creditor was not justified in relying on it.

Gerdes v. *Lustgarten,* Adv. Ops. 116, Sup. Ct. Rep. 107.

The principal objection offered to the discharge of a bankrupt was that he had obtained credit from a certain objecting creditor bank upon a false statement in writing. This is made a bar to discharge by Section 14b of the Bankruptcy Act. The Circuit Court of Appeals for the Second Circuit, agreeing with the referee and reversing the District Court, held that even if the statement were false, on account of the lapse of time between the making of the statement and the obtaining of the loans and the general financial conditions, then prevailing, the bank "was not justified in relying upon the statement." It accordingly instructed that a discharge be granted. On writ of certiorari the judgment was reversed by the Supreme Court.

Mr. Justice Sanford delivered the opinion of the Court. The essential part of his opinion on the main point is as follows:

> Under the Bankruptcy Act the discharge is to be denied if it is shown that the bankrupt "obtained money or property on credit on a materially false statement in writing, made by him . . . for the purpose of obtaining credit." The only essentials to the statutory bar, in so far as relates to the present question, are: (a) that the written statement was made for the purpose of obtaining credit; (b) that it was materially false; and (c) that the credit was obtained upon it. If these are established the vice inherent in the original falsity of the statement is not remedied by the lapse of time; and if the creditor extends credit upon such a false statement while it is still in force and binding upon the bankrupt, within the time in which he intended it should serve that end, it does not lie in his mouth to say that by reason of extrinsic circumstances the creditor was not justified in relying upon it. In short, the lapse of time is only material in determining whether credit was extended within the period intended, while the statement was still binding on the bankrupt, and whether the creditor in fact extended the credit upon the faith of the statement.

The cause was remanded to the District Court for further proceedings to determine the questions of fact in reference to the financial statement.

The case was argued by Mr. Moses Cohen for the trustee and by Mr. Lawrence J. Bershad for the bankrupt.

Bankruptcy,—Exemptions

The exemptions allowed a bankrupt are not of property which would be exempt if some condition were performed, but of property to which there is under the state law a present right of exemption at the time the petition is filed.

White v. *Stump,* Adv. Ops. 122, Sup. Ct. Rep. 103.

A voluntary bankrupt failed to claim, in his petition, a homestead exemption for a quarter section of land on which he and his family resided. But two months after the filing of the petition he did claim it. The referee disallowed the claim, the District Court reversed the ruling, the Circuit Court of Appeals for the North Circuit again reversed it, and on certiorari the Supreme Court held the claim not allowable and reversed the Court of Appeals.

Mr. Justice Van Devanter delivered the opinion of the Court. Under Idaho statutes a homestead exemption arises only when a declaration is made and filed in the manner of a conveyance of real property. This the bankrupt had failed to do until a month after the petition in bankruptcy had been filed. Pointing out that under Section 6 of the Bankruptcy Act exemptions are allowed according to state laws existing when the petition is filed, he said:

> When the law speaks of property which is exempt and of rights to exemptions it of course refers to some point of time. In our opinion this point of time is the one as of which the general estate passes out of the bankrupt's control, and with respect to which the status and rights of the bankrupt, the creditors and the trustee in other particulars are fixed. The provisions before cited show—some expressly and others impliedly—that one common point of time is intended and that it is the date of the filing of the petition. The bankrupt's right to control and dispose of the estate terminates as of that time, save only as to "property which is exempt", sec. 70a. The exception, as its words and the context show, is not of property which would or might be exempt if some condition not performed were performed, but of property to which there is under the state law a present right of exemption —one which withdraws the property from levy and sale under judicial process.
>
> The land in question here was not in that situation when the petition was filed. It was not then exempt under the state law, but was subject to levy and sale. One of the conditions on which it might have been rendered exempt had not been performed. Under the state law the fact that the other conditions were present did not suffice. The concurring presence of all was necessary to create a homestead exemption.

The case was argued by Mr. James E. Babb for the trustee and by Mr. Harve E. Phipps for the respondent.

Bankruptcy,—Tax Claims

The 1% per month imposed by the 1916 Income Tax Act upon sums due and unpaid is compensation, not penalty, and is hence an allowable claim in bankruptcy.

United States v. *Childs,* Adv. Ops. 124, Sup. Ct. Rep. 110.

In the federal income tax provisions of 1916 it is provided that to sums due and unpaid after a

certain time "there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due." In a bankruptcy proceedings the referee decided that both the five per centum and the one per centum were penalties and hence not allowable as claims under section 51-j of the Bankruptcy Act. The Government prosecuted appeals but not until the Supreme Court was reached was judgment reversed.

Mr. Justice McKenna delivered the opinion of the Court after stating the conclusions of lower courts and the theories on which they were based. He said:

> We are unable to concur. It makes the rate of interest that of a particular locality, differing with the locality—in New York, as said by the Government, 6%, in the middle West 8% and on the Pacific Coast 10%, and abridges or controls a Federal statute by a local law or custom, and takes from it uniformity of operation. Besides, the Federal statute is precise, and it is made peremptory by the distinction between "penalty" and "interest," and if it may be conceded that the use of the latter word would not save it from condemnation if it were in effect the former, it cannot be conceded that 1% per month —12% a year—gives it that illegal effect, certainly not against legislative declaration that is within the legislative power, there being no ambiguity to resolve. . . .
>
> The tax in this case is one on income; a burden imposed for the support of the Government. Interest is put upon it and so denominated, distinguished from the 5% as penalty, clearly intended to compensate the delay in payment of the tax—the detriment of its non-payment, to be continued during the time of its non-payment—compensation, not punishment.

The case was argued by Solicitor General Beck, by Assistant Attorney General Mabel Walker Willebrandt, and by Mr. Sewall Key, for the Government, and was argued by Mr. Moses Cohen for the trustee in bankruptcy.

Carriers,—Federal Control, Practice

By including an unfounded objection to jurisdiction over the subject matter in a special appearance and motion to quash the summons, the Director General held not to have waived his immunity to suit established by General Orders issued under the Federal Control Act.

Davis v. *O'Hara*, Adv. Ops. 119, S. C. Rep. 104.

Certain General Orders, issued pursuant to the Federal Control Act, require all suits against the Director General to be brought either in the county where the cause of action arose or in the county where plaintiff resided at the time. Plaintiff, who was injured in Iowa, where he resided, brought suit in a Nebraska court. The Director General appeared specially to object to the jurisdiction of the Court "over the person of the defendant, and over the subject matter of this action." This motion was overruled, and though the defense was subsequently made on the merits, the second trial resulted in a judgment for plaintiff. The Nebraska Supreme Court held that challenging the jurisdiction of the court over the subject matter amounted to a voluntary appearance giving the court jurisdiction over the defendant. On certiorari to the Supreme Court of the U. S., judgment was reversed.

Mr. Justice Butler delivered the opinion of the Court. He said in part:

> Defendant's special appearance and motion did not amount to an objection to the jurisdiction over the subject matter; that is, it did not raise the question whether, considering the nature of the cause of action asserted and the relief prayed by plaintiff, the court had power to adjudicate concerning the subject matter of the class of cases to which the plaintiff's claim belonged (citing cases). The stated purpose of the special appearance was broader than the grounds alleged and, in so far as it related to the subject matter, was not carried into effect. There was nothing in the moving papers to suggest that the Nebraska court had no jurisdiction to try and determine actions, founded on negligence, to recover damages for personal injuries suffered by railway employees while engaged in the performance of their work. Undoubtedly, the district court of Douglas County would have had jurisdiction if the accident happened in that county or district, or if plaintiff resided there at the time he was injured. The general orders on which defendant's motion rested did not relate to jurisdiction of the subject matter; and the Supreme Court of Nebraska so held. The substance of the objection stated and the grounds alleged should control, rather than the declaration of purpose.

Furthermore, he pointed out, even if the motion amounted to an objection to jurisdiction over subject matter, the rule that objections to jurisdiction over the person are waived by general appearance did not apply because under Nebraska practice objections to jurisdiction may be made or renewed by answer setting up defenses on the merits.

The case was argued by Messrs. C. A. Magaw and Nelson H. Loomis for the Director General, and by Messrs. John O. Yeiser and John C. Travis for the respondent.

Corporations, Liability for Erroneous Issuance of Stock,—Judicial Sales

A pledgee of stock held to have acquired absolute title at a judicial sale; and the corporation, which issued the stock to another pending the suit, held liable to the pledgee for the full value of the stock.

The failure of a lienor to take out a supersedeas pending his appeal in his suit to enforce the lien, held not to cut down, in equity, absolute legal rights to the security subsequently acquired at the judicial sale.

Mackenzie v. *A. Engelhard & Sons Co.*, Adv. Ops. 95, Sup. Ct. Rep. 68.

Plaintiff was the holder of a note secured by a stock certificate made out to his debtor, Eschmann. He brought an unsuccessful suit in a state court to have his lien on the stock enforced. The judgment for defendants contained the unusual adjudication that Eschmann be "permitted" to withdraw the certificate from the exhibits, leaving a copy. Plaintiff prayed an appeal, but did not obtain a supersedeas. The appeal was successful, the upper court adjudged that the shares should be sold, and on the sale, subsequently confirmed by the court, plaintiff bought the stock. But prior to this sale Eschmann had sold the stock and canceled the certificate. The present suit was brought against the corporation to compel it to issue the stock to plaintiff or pay him its value. The District Court gave plaintiff judgment for the agreed value of the stock, but the Circuit Court of Appeals for the Sixth Circuit held that as plaintiff had not obtained a supersedeas to the first judgment in the former suit, his relief in equity should be limited to the amount of the debt, interest and costs in the other suit. Writs of certiorari were obtained by both parties. The Supreme Court, sustaining the view of the District Court, reversed the decree.

Mr. Justice Holmes delivered the opinion of the Court. He said:

> It does not seem to us to need argument to establish that the sale to the plaintiff was effectual as against the parties to the suit. The decree confirming the sale was final and not appealed from. We believe the rule in Kentucky to be that purchasers *pendente lite* would stand

in the defendant's shoes. An appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of. Therefore, apart from more special considerations applicable here but not needing mention, the assignees of the stock stood no better than Eschmann unless they were helped by the provision that "an appeal shall not stay proceedings on a judgment unless a supersedeas be issued" in the Kentucky Civil Code. Section 747. But there was no question here of any proceedings on the judgment. When the final judgment was reached it determined the rights of Eschmann *ab initio*, and it seems to us impossible to believe that it did not also determine the rights of the assignees.

With regard to the reduction made by the Court of Appeals upon the amount plaintiff was allowed to recover, he said:

> We come then to the question whether equity requires any diminution of the rights acquired by the plaintiff under the judicial sale to him. It is adjudged that his rights are absolute. It is a strong thing to cut down his rights under the judgment of the State Court. The parties stood upon equal ground. Without going further into the facts each seems to have been trying to get the better of the other and neither can get much help from atmospheric considerations. The plaintiff did not care to assume the liabilities of a supersedeas bond, but if the defendant took no steps to protect itself it might have done so. The plaintiff was not bound to pursue the assignees of the stock before looking to the corporation (citing case). It is immaterial what were the limits of the plaintiff's original interest; he comes before this Court as absolutely entitled to the stock and the preliminaries to his acquiring the title have no bearing on the case. He got it at a better bargain than he would have done had his adversaries taken a different course, but he got it and his right is not to be impugned.

Mr. Justice McReynolds, Mr. Justice Sutherland and Mr. Justice Sanford dissented.

The case was argued by Mr. William Marshall Bullitt for McKenzie, and by Mr. J. Verser Connor for the corporation.

Statutes,—Civil Code of Panama

The courts of Panama are bound to construe statutes by principles of common law, rather than civil law, and therefore the general provisions of the Panama Civil Code are insufficient to fix civil liability for wrongful death.

Panama Railroad Co. v. *Rock,* Adv. Ops. 63, Sup. Ct. Rep. 58.

In a suit brought to recover damages for the death by defendant's negligence of plaintiff's wife, a passenger on a railroad train in the Canal Zone, the question was presented as to whether the following provision of the Panama Civil Code, then in force, imposed a civil liability for wrongful death:

> He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed.

This section had been taken from a Chilean code, and was also found in the Spanish code and in the Code Napoleon. Under common law this provision was, of course, insufficient in itself to give an action for death damages. Should, however, the Panama courts follow French and Spanish constructions which had justified such an action as this? By a five to four decision, the Supreme Court held that they should not, but that common law principles of construction were to be applied. Judgment for plaintiff, affirmed by the Circuit Court of Appeals for the Fifth Circuit, was reversed.

Mr. Justice Sutherland delivered the prevailing opinion. He held that French decisions were inapplicable because the Panama provision was taken from the Spanish code, not the French, and made it clear that there were no Spanish decisions until after the adoption of the provision into the codes of Chile and Panama. And in none of the American civil law jurisdictions could he find decisions supporting plaintiff's contention. He adduced decisions declaring the duty of the Zone courts to follow the rules of statutory construction of the common law. In conclusion he said:

> Under all the circumstances, we conclude that the reach of the statute is to be determined by the application of common law principles (citing case); and, applying these principles, it is clear that the general language of Section 2341 does not include the right of action here asserted. It would not be difficult to find generalizations of the common law quite as comprehensive in terms as the provision now under review—as, for example, "There is no wrong without a remedy"; but, nevertheless, under the principles of the common law, it has required specific statutes to fix civil liability for death by wrongful act; and it is this requirement, rather than the construction put upon the statute in civil law countries, that the inhabitants of the Canal Zone are presumed to be familiar with, and which affords the rule by which the meaning and scope of the statute in question is to be determined.

In the dissenting opinion, the Chief Justice, Mr. Justice McKenna, and Mr. Justice Brandeis concurred with Mr. Justice Holmes, who said in part:

> It would seem natural and proper to accept the interpretation given to the article at its source, and by the more authoritative jurists who have had occasion to deal with it, irrespective of whether that local interpretation was before or after its adoption by Spanish States, so long as nothing seriously to the contrary is shown. The only thing that I know of to the contrary is the tradition of the common law. . . .
>
> Without going into the reasons for the notion that an action (other than an appeal) does not lie for causing the death of a human being, it is enough to say that they have disappeared. The policy that forbade such an action, if it was more profound than the absence of a remedy when a man's body was hanged and his goods confiscated for felony, has been shown not to be the policy of present law by statutes of the United States and of most if not all of the States.

The case was argued by Mr. Walter F. Van Dame for the railroad and by Mr. William C. Todd for the defendant in error.

Statutes,—War Risk Insurance Act

Unless arbitrary, unsupported by the evidence, or wholly dependent upon a question of law, decisions of the Director of the Veterans' Bureau are final and not subject to review by the courts.

Silberschein v. *United States,* Adv. Ops. 68, Sup. Ct. Rep. 69.

Following earlier decisions, the Supreme Court affirmed a judgment dismissing a suit brought by a veteran of the war against the United States upon a claim for compensation arising under Section 300 of the War Risk Insurance Act, as amended. The Director had reduced an award for total temporary disability to nothing, and, although there is no express provision in the act for suit on such a claim, plaintiff filed a petition in the District Court for the Eastern District of Michigan.

Mr. Justice Sutherland delivered the opinion of the Court. He examined the petition and concluded:

> Clearly, the petition does not present a case where the facts are undisputed and the only conclusion properly to be drawn is one favorable to petitioner, or where the law was misconstrued, or where the action of the executive officer was arbitrary or capricious. . . . .
>
> The statute which creates the asserted right, commits to the Director of the Bureau the duty and authority of administering its provisions and deciding all questions

> arising under it; and in the light of the prior decisions of this court, we must hold that his decision of such questions is final and conclusive and not subject to judicial review, at least unless the decision is wholly unsupported by the evidence, or is wholly dependent upon a question of law or is seen to be clearly arbitrary or capricious.

The case was argued by Mr. Rowland W. Fixel for the claimant and by Assistant Attorney General William J. Donovan for the Government.

Statutes,—Trading With the Enemy Act

A cause of action for damages for breach of contract is a "debt" for which suit may be brought under Section 9 of the Trading with the Enemy Act.

Miller et al. v. *Robertson,* Adv. Ops. 54, Sup. Ct. Rep. 73.

Plaintiff was the assignee of a mining company which had had a contract to sell its output of zinc crude ore to a firm of zinc smelters. The properties of this firm were taken over during the war by the Alien Property Custodian, and this suit was brought against that officer to establish a "debt" plaintiff claimed to be owing from the smelter firm on account of damages alleged to have resulted from the buyer's breach of contract. Judgment for plaintiff was affirmed by the Circuit Court of Appeals for the Second Circuit, and, on appeal, again by the Supreme Court.

Mr. Justice Butler delivered the opinion of the Court. The first contention was that plaintiff's claim was not such as could be enforced by suit under the Trading with the Enemy Act. This enactment gave the right to institute suit to one "to whom any debt may be owing from an enemy, or ally of enemy." The contention made and here rejected was that "debt" included only causes of action which at common law were enforceable in an action of debt. The learned Justice declared that the statute was highly remedial and hence to be liberally construed. After citing many statutes within which a cause of action for damages for breach of contract had been held to be a debt, he said:

> There is nothing in the language of the act or the reasons for its enactment to indicate a purpose to restrict the right to institute suits in equity as authorized in Section 9 to causes of action cognizable in debt under technical precedural rules. The words of a statute are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears (citing cases).
>
> We think it immaterial whether plaintiff's cause of action is one for which an action of debt might be maintained. It would be unreasonable and contrary to the intention of Congress to exclude claims like that here in question, and we hold them to be included.

Of the six remaining contentions successively considered and rejected by the Court two are of sufficient general interest to receive notice here. One was that the contract lacked mutuality because the seller promised only such ore as it might ship from the mine and was not bound to mine or ship any ore. After pointing out that both buyer and seller had long established businesses, the learned Justice said:

> The parties intended to make a contract,—one to sell, and the other to buy, zinc ore. By plain statements and manifest implications, the seller was bound for a definite time not otherwise to dispose of its ore; the buyers were given an option on the lower grade ore; the seller was bound at all times, when not prevented or delayed by some cause beyond its control, to mine and to ship to the buyers the total production of zinc ore of the specified grade; and the buyers were bound to take and pay for all such ore when not prevented or delayed by causes beyond their control as specified in the contract. The quantities of ore to be mined and shipped were not limited to those to be produced by the equipment and methods employed at the time of the execution of the contract. The proposed picking plant was to be added, and the increased output was expected and bargained for.

Another objection was to the allowance of interest. The Court held:

> It would be unjust and inconsistent with the remedial purposes of Section 9 to hold that the seized enemy property cannot be held for the full amount of the seller's loss, and that, to the extent of interest during the period of the war, compensation must be denied. The proposition that the enemy defendants, as a matter of law, are entitled to be relieved from interest during the war cannot be sustained.

Nor could the allowance of interest be defeated on the theory that this was a suit against the United States, against which interest is not allowable:

> While the suit . . . is one against the United States, the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest (citing cases) does not apply.

The case was argued by Special Assistant to the Attorney General Lindley M. Garrison for the Alien Property Custodian and by Mr. Alfred Sutro for the assignee of the mining company.

Statutes,—Employers Liability Act

The administrator of one whose positive duty it is to prevent an act which results in his death may not recover damages under the Employers' Liability Act on the ground others secondarily responsible might have prevented the accident.

Davis v. *Kennedy,* Adv. Ops. 99, Sup. Ct. Rep. 33.

This was an action under the Employers Liability Act of April 22, 1908, brought by the administratrix of a train engineer killed in a collision. The engineer had been instructed never to go beyond a certain point unless a train from the other direction had passed. Nevertheless he did go beyond this point, and the collision resulted. The Supreme Court of Tennessee sustained judgment for plaintiff on the ground that other members of the crew were bound to look for the approaching train and that their negligence contributed as a proximate cause to the engineer's death. On writ of certiorari, the Supreme Court of the United States reversed the judgment.

Mr. Justice Holmes delivered the opinion of the Court, and said:

> It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in a secondary relation to the movement had done more.

The case was argued by Mr. Fitzgerald Hall for the Federal Agent and by Mr. W. E. Norvell, Jr., for the administratrix.

Statutes,—Carmack Amendment, Remedies

State and federal courts have concurrent jurisdiction to enforce the right of action granted by the Carmack Amendment, and this choice of forums is not affected by remedial advantages inherent in the state court.

State of Missouri v. *Taylor,* Adv. Ops. 78, Sup. Ct. Rep. 47.

A shipper brought an action in a Missouri state court to enforce the liability of an initial carrier for a loss occurring through the negligence of a connecting carrier. The only assertion of jurisdiction

over defendant railroad was by garnishment, as provided by Missouri practice, of traffic balances due a connecting carrier doing business in Missouri. This decision followed upon the application of the railroad for a writ of prohibition to enjoin the inferior court judge from taking cognizance of the pending action. The principal contention was that as the liability arose under a Federal law, the Carmack Amendment, and as jurisdiction could not have been obtained in the Federal court because personal service could not have been made upon defendant, therefore no state court could entertain the suit. On certiorari the Supreme Court of the United States affirmed judgment denying the writ.

Mr. Justice Brandeis delivered the opinion of the Court. The essential part of his opinion is as follows:

> Congress . . . dealt solely with the substantive law. As it made no provision concerning the remedy, the federal and state courts have concurrent jurisdiction (citing cases). The federal right is enforceable in a state court whenever its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws (citing cases).
>
> Missouri conferred jurisdiction over claims of this nature upon the court in which consignee sued. Under its law, this jurisdiction may be exercised, to the extent of applying property attached to the satisfaction of a claim, even though personal service cannot be made upon the defendant. That remedy is one which was not available to the consignee in the federal court for Missouri. But this fact is not of legal significance (citing case). The origin of the right does not affect the maner of administering the remedy. The grant of concurrent jurisdiction implies that, in the first instance, the plaintiff shall have the choice of the court. As an incident he is entitled to whatever remedial advantages inheres in the particular forum (citing case). No peculiarity of state procedure will be permitted to enlarge or to abridge a substantive federal right.

The case was argued by Mr. M. U. Hayden for the railroad and by Mr. J. L. London for the judge of the state court (for the shipper).

ON MAKING CONSTITUTIONS

Some Popular Impulses and Misconceptions That Make for Frequent Constitutional Changes —Long Constitutions More a Result of Bargaining Than Public Demand—A Humorous Popular Inconsistency—Would It Have Been Better if States Had Never Adopted Constitutions?

By HON. CHARLES A. WOODS
Of United States Circuit Court of Appeals, Fourth Circuit

IF people were always logical and consistent in either public or private affairs, the result would be immense loss to the sport and comedy of life. Without the factors of sport and comedy, politics and business would become too serious to be borne by humanity. The drama—the combat and the contrast between the serious and the absurd, between wisdom and folly, between the victorious and the defeated—make life tolerable to the pessimist and joyous to the optimist.

Take for example the issue of the short ballot. The argument in favor of it seems conclusive. There is hardly a denial that efficiency in official service would be promoted if the people were only called upon to choose from candidates for the high and important places. Every voter by a little investigation could reach a somewhat intelligent conclusion as to the fitness of these few candidates. On the other hand hardly any voter in large communities can so inform himself as to make intelligent selections from the candidates for the great and increasing number of subordinate elective offices. With the short ballot a few citizens selected by the voters with some knowledge of their qualifications would be intrusted with the conduct of public affairs, including the selection of subordinate officers, and their responsibility would be fixed and concentrated. The long ballot tends to prevent intelligent choice and dissipates official responsibility. Yet the short ballot does not appear to be in popular favor. Is this solely because the professional politician opposes it? Is there not the other reason that men and women love the combination of game and drama—of political canvasses and elections? Is it not for this reason they are unwilling to retire any of the players or give up any part of the play?

This same love of action for mere action's sake and of change for change's sake may account also in some degree for the making of long constitutions and frequent changes in constitutions. The average American—perhaps the average man everywhere—is under the delusion that he wants repose. What he really wants is to have the monotony of life broken by the sensation of agitation and change, with as much assurance as he can get of benefit or protection for himself or to some cause he has at heart. Much evil comes "entirely because people fancy they can do much by rapid action—that they will most benefit the world when they most relieve their own feelings; that as soon as an evil is seen 'something' ought to be done to stay and prevent it."[1] Men are given to mistake this instinct of agitation and change for conviction and duty.

It is a truism to say that enjoyment of the stirrings of primitive sentiments and passions and of acting upon them accounts for much of the history of this country and all countries. The enjoyment of feeling and of imparting such sensations is expressed in the expletives and false laudation and denunciation so general even in writings of great editors and authors and in the speeches of great statesmen and divines. This extravagance of laudation and condemnation has been directed

1. Bagehot, Physics and Politics, page 189.

not only towards political parties and policies and persons, but towards every department of government and the constitution of the United States and the state constitutions. One can hardly help feeling that the greater the crisis calling for sedate judgment, moderation and tolerance, the greater seems to be the enjoyment of speakers and writers in expressing passions and prejudices, and of people in responding to them. A fair student cannot doubt that the American people have often mistaken for a guard of honor the passions and prejudices that hold them in prison. Study of the speeches and writings which preceded the War of 1861 suggests the reflection that the national tragedy might not have occurred had there been perspective and breadth of mind sufficient to withstand the love of vehement and passionate expression in leaders and people.

All this leads to the reflection that political and legal institutions and methods ought always to be open to examination in the effort to discover the alloy of passion and prejudice which may be present in any of them.

There is another false conception, so general as to be accepted almost as a popular axiom by this buoyant and onrushing people, which carries with it a long train of ills; a conception that accounts in great degree for unscientific and inferior constitutions and for retarded growth of the legislative branch of state governments in intelligence, dignity and public confidence. It is the popular notion that improvement means increase or enlargement. Rarely does a business man think of improving his business by curtailing it. To him improved business usually means larger production and sales, even at the peril of bankruptcy. In public affairs when an evil becomes evident the habit of the public mind is to think of increased regulation and restriction as the remedy. Whereas many evils begin to wither unto death without official action as soon as they become evident and are exposed to the light and fire of public discussion and public censure.

The notion that something positive and drastic must be done by public authority as soon as an evil appears sufficient to attract public attention, takes the form of demand for direct governmental action by the people. This notion is expressed in the demand for enlarged state constitutions, and provisions in them commanding and restricting the exercise of legislative power. The more elaborate the constitution thus made, the more numerous and meticulous its restrictions and commands. Is it anything more than a delusive thought that inhibitions and commands directed to the legislature by the framers of a constitution can prevent legislation from being foolish and corrupt and make it wise and pure? The states with new and elaborate constitutions can hardly claim that the restrictions and commands with which they have hampered their legislatures have resulted in purer and wiser legislation than has been enacted in states whose short constitutions constitute a mere framework of government. It may well be doubted that such restrictions have contributed at all to the purity or wisdom of state policies or state laws or have prevented waste of public power or property. Unless the restrictions on legislative power amount to complete constriction, there is always enough left for a stupid or corrupt or gullible legislature to squander public revenue and sacrifice public interest. About eighty years ago the legislatures of Illinois, Ohio and other states went mad in giving state credit to railroads and other corporations looking to internal development. When disaster resulted, the full current of constitutional restriction and direction of legislative action set in, directed chiefly to the correction of this abuse. This only changed the form of the evil. Cut off from state aid by the constitution, the mendicants for public donations then secured legislative sanction for municipal aid to their enterprises. Like disaster and like constitutional restrictions followed. But it was not these constitutional restrictions and commands which marked the end of such squandering of public credit and revenue and sacrificing of public interest. It was the pain of the people for the public losses that made them cry out with indignation so consuming that better legislatures were elected who either did not will or did not dare to tamper with public honor or donate public property. The constitutional restrictions and commands were the results of the evil, but they were not the cure. Indeed the wasteful donations of state and municipal favors for private purposes have usually been due to popular demand for such favors.

But is it true that long constitutions with detailed restrictions on legislative power are demanded by the public? Possibly members of constitutional conventions may average greater intellectual force than members of legislatures; but the people have no more part in framing a constitution than in drafting a statute. The eminence of members of a convention is a reason why each delegate, (unless he has the stature of a statesman), should propose some distinct provision as his contribution, and the constitution results from these many contributions rather than from popular will. The whole elaborate document of many pages and many enactments thus put together is too long and too involved for general study and understanding. It is ratified or rejected by the vote of the people on the popular favor or disapproval of one or more of its provisions of possibly transitory importance which happen to arrest public attention and discussion. So elaborate details of constitutions originate not in popular demand, but in bargaining—the give and take—of members of constitutional conventions; and their acceptance by the people is due to their approval of one or more particular provisions without thought of the details.

With all its seriousness there is a touch of humor in the association of the demand for detailed constitutional restriction on legislative action and denunciation of the courts for giving effect to them by declaring statutes unconstitutional. Conventions make constitutions and people adopt them with full view of the fact that courts both state and federal have long exercised the power of declaring statutes unconstitutional. Is not then the framing of constitutions with long and detailed restrictions on legislatures equivalent to this humorous injunction to the courts from the people, or at least from the constitutional convention:

"We do not trust the legislators whom we are to elect; we have put them in a constitutional pen and if they attempt to break out we expect the judges to drive them back—except when we want them to break out. The courts must guess, and if

they guess wrong we will denounce them for letting the legislature out of the pen or keeping it in at the wrong time." It should not be surprising that the courts refuse to guess at the elusive unexpressed exception; and that when they have guessed, the venture has not been fortunate.

It may be uncertain whether the butt of the humor strikes the constitutional conventions, the people or the courts—certainly it does not hit the legislature.

It is not to be denied, however, that courts have not been without fault in partaking too freely of the sentiment in favor of restriction of legislative power, and have sometimes given the people reason to point the finger of complaint at them for adding to the expressed restrictions others which were not expressed, thus mistaking for a part of the fence the sign boards put up in the legislative enclosure pointing out the best way, but not the only way. To illustrate, the judicial trend has been in favor of the view that although state legislatures have all legislative power not denied them by the constitution, yet when the constitution deals with a subject, the legislature is by that fact denied power to deal with other phases of the same subject.

The most ardent advocate of the unwritten constitution, such as that of Great Britain, could not doubt the necessity of a written constitution for the United States. A covenant of the states was not only an essential foundation of union, it created the Union. It is but a truism to say that the wisdom of its plan and the excellence of its form and structure are proved by the fact that for one hundred and thirty years it has held together as one nation many different states asserting sovereignty of their own, jealous of the government they had created and jealous of each other, with but one attempt at forcible disruption. But there was no such necessity for written constitutions for the separate states. State constitutions did not create the states.

Is it not at least debatable whether each state would not have achieved more distinction and excellence in government as well as community character, culture and wealth without a written constitution than with it? Every state in the Union had the heritage of all that is good in the English constitution, and all the conceptions of freedom and representative government of the Teutonic race. Before the formation of the federal constitution each state had a governmental form and structure and a legislative assembly whose enactments supplied laws appropriate to the demands and needs of the people as they arose. The early state constitutions were little more than the formulation of the pre-existing colonial usages and conceptions of political right. They were framed and ordained by the provincial legislative assemblies or conventions called for the purpose, but in only two states were they submitted to the vote of the people. Thus the colonial legislative assembly, not the people, provided for the legislative, executive and judicial departments of state governments and ordained the bill of rights. This action of the legislative assembly could hardly have had any more inherent force by reason of calling their enactment a constitution instead of a statute. If this framework of government, including the bill of rights, had been put by the colonial assembly in the form of a statute it would have been regarded a law of extreme sanctity, having its foundation in the fundamental conceptions and rights of the people; but it would not have been so rigid as to restrict the political progress of the people or allow the courts to bind the hands of the legislature. Had the formulation of the bills of rights been statutory, not constitutional, hardly less forceful would they be as the expressions of political enlightenment and liberty. This is illustrated by the right to devise and inherit property, esteemed by most persons property rights as sacred as the right to own property. The legislature has the power to destroy both these rights, but the power will probably never be exercised. They are as safe as if they were included in the protection of a constitutional bill of rights. Might not this elastic plan of government have been better than the fixity of constitutional mould for states of small and homogeneous population, rapidly changing and developing in material wealth, law and customs. The public discussion which preceded the Revolution seems to prove that the essential principles of political liberty afterwards expressed in the bill of rights were so regnant in political consciousness that they hardly needed to be formally ordained. Indeed the great demand for a bill of rights in the federal constitution tends to prove that none was necessary. There seems to be no more reason to expect a violation of the personal rights expressed in them by the state legislatures than by the English Parliament. That the leaders of the people were influenced by this conception of the dignity and value of an untrammeled legislature is evidenced by the brevity and elasticity of the early state constitutions and the many things left unsaid. The purpose of the framers of the federal constitution to establish a government and to avoid legislation in the constitution is made manifest by the brevity and conciseness of the instrument and by the whole record of their deliberations. They refused to insert a bill of rights on the ground that it was unnecessary, ten states voting against inserting a bill of rights and none in favor of it. The convention assumed that these rights were too well understood to need expression. It is an interesting fact that the bill of rights afterwards inserted by amendments which were earnestly advocated by Mr. Jefferson, became the chief source of the exercise of the power by the Supreme Court to declare legislation unconstitutional, which gave so much offense to that statesman. Without written constitutions and consequent defense of the bill of rights at the hands of the courts there might have been for a time improvident and corrupt legislation. But there would have been the greatly countervailing advantage of intense and constant interest and growing intelligence of the people, for the sake of their own safety and welfare, in the selection of their legislatures, and the consequent elevation of the standards of capacity and integrity of state legislatures.

The advantage of the insertion in the constitutions of principles of personal rights crystallized in the form of bills of rights may be very great. But in lauding benefits it must not be forgotten that it has been by virtue of these bills of rights that the courts have exercised the restraints on legislative action as to fundamental matters often so bitterly complained of by the people. Whether originally intended or not as a practical result that restraint was caused by insertion in constitutions to be con-

strued by the courts of such terms as "due process of law," "taking private property without just compensation," "free exercise of religion," "free speech," "the right to bear arms," "security against unreasonable searches," "privileges and immunities of citizens," "equal protection of the law." The doctrine is firmly established that it is the duty of the judicial department of government to determine when these rights have been invaded by the legislature; and this for the reason that the court must hold an act of the legislature void if it purports to do a thing forbidden by the higher written law. Thus the higher written law has elevated the courts in dignity and power at the expense of the dignity and responsibility of the legislature. Is there not ground for belief that in the long run essential personal rights would have been as well protected at the hands of the legislative branch of the government as by the courts? Is it not certain that if the trust had been reposed in the legislative branch of government, both state and national, instead of in the courts, that the political vigilance and intelligence of the people would have been advanced?

Whatever may be the value of written constitutions, it cannot be denied that the people's sense of responsibility for their government has been dwarfed by reliance on them and on the courts' enforcement of them for protection against legislative action, rather than on their own concern and active participation in public affairs. The conviction that nothing but their own constant vigilance and activity can preserve their rights is the only safeguard of the people against the decline of the legislative branch of any form of representative government.

Conversely, the habit of reliance on a document lulls the sense of danger and interest, impairs the sense of public obligation—and worst of all, lowers the most important branch of representative government in responsibility, character and influence.

Belief in the necessity of written constitutions for states is now so firmly fixed by tradition that no one would have the boldness to propose that a state exist without a written constitution, but the consideration advanced to indicate that state governments might have been instituted and carried on without written constitutions adds force to the opinion that a state constitution should be nothing more than a framework of government.

In their constitutions the people have dealt with some subjects, or authorized legislatures to do so, because of doubt of the power of the legislature to do so without constitutional authority. That these subjects are within the scope of general legislative power is now so well recognized that express constitutional authority for legislative action on them is superfluous. What need is there for constitutional authority or command to the legislature to deal with public education, or public roads, or charitable institutions, or public health, or control of public service corporations, or conservation of natural resources, or irrigation and drainage, or monopolies, or trusts, or the militia, or private and municipal corporations, or banking, or internal improvement, or the manner of conducting elections, or public ownership and management of elevators, mines, electric plants and other business of distinct public concern? Is it not manifest that changing social and economic conditions forbid fixed and inelastic constitutional regulation of these and other matters? The power of state legislatures to deal with all of them, in the absence of constitutional restriction, seems to be now fully recognized by the courts and by the people. No constitutional provision is necessary to give to a state legislature the power to provide anything that is really a great public need. As decided by the Supreme Court in Noble State Bank vs. Haskell, 219 U. S. 104, 111, legislative powers without constitutional aid may be exercised in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and predominating public opinion, to be greatly and immediately necessary to the public welfare. When the constitution creates a legislature and clothes it with the legislative power of the state all this is included. Manifestly legislatures are better qualified than constitutional conventions and courts to decide in the rapidly changing conditions what is a public need and what laws should be enacted as essential to the public welfare. Yet constitutions are made in the form of detailed legislation as if their framers had the gift of prophecy to know the future needs of the people.

The more detailed the provisions the greater necessity for frequent amendment to meet changed conditions. One amendment calls for another, and familiarity with many amendments gives freedom to propose many for which there is no need. In the confusion of it citizens not only fail to respect and reverence the constitution, but fail to know it and to recognize the difference between their constitution and their statutes. The bald figures make proof of this assertion:

> By the proposal of individual amendments either by legislative bodies or through popular petition, a great deal in the way of constitutional change has been proposed and accomplished since 1900. Since 1900, 1504 constitutional amendments have been proposed in the 48 states, of which 904 have been adopted and 600 rejected. Of this number 150 proposed amendments were submitted in California, 134 in Louisiana, 88 in Oregon, 52 in Colorado and Georgia, 57 in New York, 71 in Ohio, 51 in South Dakota and 50 in Michigan. Upon matters relating to taxation alone 257 proposed amendments have been submitted in the several states between 1900 and 1918, of which 142 were adopted.
>
> Certainly not more than 1 out of 4 of the proposed amendments in the several states has related to any matter of fundamental importance. The greater number of the amendments have related to matters of no great importance, and probably half of them to matters which would not have been regarded as important even if they had been subjects of legislative enactments. For example, there were constitutional amendments in North Dakota in 1904 and 1914 changing the names of state charitable institutions, and in the same state in 1904 and 1916 establishing institution for the feeble-minded and for the insane.[2]

Enlargement of constitutions has extended to the bill of rights itself, thus imposing on the courts greater burdens and power to influence legislation and limiting the power to legislate, either by the legislature itself or by means of the initiative and referendum. The Bill of Rights declared by Act of Parliament in 1689 contained 13 sections or provisions, three of which relate to the throne and have no application here; that of George Mason 13; Constitution of the United States 11; of South Carolina 28; of Colorado 24; of Massachusetts 30; of New Jersey 21; of Kentucky 28; of Indiana 37;

2. Bulletin No. 1, Legislative Reference Bureau, Illinois, 1919, "The Procedure and Problems of the Constitutional Convention," pages 36, 37.

of Alabama 39; of Arkansas 29; of Georgia 37; of Maryland 45.

Some contain axioms of legislative virtue, as in Indiana, "The criminal code shall be founded on principles of reformative not vindictive justice." There are similar provisions in the constitutions of Massachusetts and New Hampshire; that of Massachusetts providing that religious societies have the right to elect their own pastors.

Taking the more conspicuous examples, the following statement of the length of the first and last state constitutions will indicate the unfortunate growth of constitutional legislation, restrictions on the power of state legislatures and detailed directions as to the conduct of government, and the claim of constitutional conventions to prophetic insight into future public needs:

	First Constitution	Last
Delaware	6 pages	31 pages
Georgia	7 pages	40 pages
Illinois	13 pages	31 pages
Mississippi	16 pages	33 pages
New Hampshire	2 pages	18 pages
New Jersey	5 pages	14 pages
New York	14 pages	32 pages
Pennsylvania	10 pages	28 pages
South Carolina	7 pages	35 pages
Virginia	6 pages	46 pages

The legislative detail entirely out of place in a constitution is thus summarized by Lord Bryce:

> Among such provisions we find a great deal of matter which is in no distinctive sense constitutional law, but general law, e. g., administrative law, the law of judicial procedure, the ordinary probate law of family, inheritance, contract, and, so forth; matter, therefore, which seems out of place in a constitution because fit to be dealt with in ordinary statutes. We find minute provisions regarding the management and liabilities of banking companies, or railways, or corporations generally; regulations as to the salaries of officials, the quorum of courts sitting in banco, the length of time for appealing, the method of changing the venue, the publication of judicial reports; detailed arrangements for school boards and school taxation, (with rules regarding the separation of white and black children in schools), for a department of agriculture, a canal board or labor bureau; we find a prohibition of lotteries, of polygamy, of bribery, of lobbying, of the granting of liquor licenses, of usurious interest on money, an abolition of the distinction between sealed and unsealed instruments, a declaration of the extent of a mechanic's lien for work done. We find even a method prescribed in which stationery and coals for the use of the legislature shall be contracted for, and provisions for the fixing of the rates which may be charged for the storage of corn in warehouses. The framers of these more recent constitutions have in fact neither cared nor wished to draw a line of distinction between what is proper for a constitution and what ought to be left to be dealt with by the state legislature. And in the case of three-fourths at least of the states, no such distinction now, in fact, exists. [8]

To this list of details found in constitutions may be added creation of all courts, including justices of the peace, regulation of their jurisdiction and time of sitting and the manner of conducting them, time of hearing motions for a new trial, prohibition of divorce, change of names of charitable institutions, regulation of hours and conditions of employment, removal of dead timber, rules of legislative procedure, sale of lands, working of roads, making new counties, salaries of judges and executive officers and clerks of court, and municipal elections.

All these details must be held by the courts as controlling against action by the legislature, whatever may be the public need for change. They make necessary a flood of constitutional amendments so great that they have almost destroyed the character of state constitutions as fundamental law. They show that the framers of the constitutions, either through heedlessness or ignorance, have no longer any adequate conception of the vital distinction between the function of a constitution and the function of a statute.

These people have shown admiration and respect for the structure and style and substance of the Constitution of the United States in every possible way except by adopting it as a standard for their state constitutions. The modern state constitution could hardly be more different if it had been the purpose of the framers to get as far as possible from the plan and structure of the Constitution of the United States. The effort of its framers was to leave out all possible details so that the needs of the people impossible to anticipate might be met by congressional legislation. The illusion of framers of state constitutions seems to be that they can anticipate the future needs of the people. The framers of the federal constitution laid their hands, which they knew would soon be the hands of the dead, on the future life of the people as lightly as possible; the framers of state constitutions lay their hands, which also must soon be the hands of the dead, heavily on the people, to the end that their own conceptions may control and constrict the future.

The need of the courts is that they be released from the burden and peril of deciding whether the legislature has undertaken to make laws contrary to meticulous and inappropriate constitutional provisions.

The need of the legislatures is that they be elevated and dignified to the exercise of full duty and power to legislate by release from the fetters of constitutional detail and consequent careless reliance on the courts to relieve them from their mistakes.

The need of the people is the conviction that successful republican government means government by representatives selected for character and capacity, and held to strict account by the people; that detailed constitutional provisions do not conserve public right and safety, but merely constrict legislative activity and retard development of the state.

8. Bryce's "American Commonwealth," 1912 ed. vol. 1, p. 448.

Judge Anderson Goes on Circuit Bench

Judge A. B. Anderson, for twenty-three years a prominent figure on the Federal District court bench at Indianapolis, was elevated today to the Circuit Court of Appeals at a ceremony in the office of Edward M. Holloway, clerk of the Circuit Court of Appeals. He takes the place on the bench left vacant by the death of Judge Francis E. Baker.

Courts throughout the building were suspended for half an hour while jurists and lawyers paid their respects to Judge Anderson. A score or more of friends from Indianapolis were also present at the ceremony. Judge Anderson will sit in the Court of Appeals with Judges Alschuler, Page and Evans.—*Chicago Daily News.*

Contributions

The articles and letters in the JOURNAL are signed with the names or initials of the authors and the Board of Editors assume no responsibility for the views expressed therein.

CURRENT LEGISLATION

The National Revenue Act of 1924

By Middleton Beaman

(Continued from November Issue)

Capital Net Losses

After several years' struggle the House succeeded in inducing the Senate to accept a provision placing capital net losses on the same plane as capital net gains. The 1921 Act provided a new method of taxation of gains resulting from the disposition of capital assets. It was provided that in such cases the tax should be computed by first finding the tax on the taxpayer's ordinary net income (which was an income computed without regard to items of capital gain or loss) and by adding to such tax 12½ per centum of the capital net gain, it being left to the option of the taxpayer whether or not he should be taxed under this provision. The new law, while retaining this provision, writes into the income sections its converse, so that if the taxpayer during the year sustains a capital net loss, his tax is required to be computed by first finding the tax on his ordinary net income and next subtracting from such tax 12½ per centum of his capital net loss, thus placing capital gains and capital losses upon a parity. The option does not exist as to losses.

The old law exempted from the definition of capital assets property held for the personal use or consumption of the taxpayer. The new law removes this exclusion, so that a taxpayer selling residential property may at his option have the benefit of the capital gain provisions.

Undistributed Profits

A provision in the old law receiving considerable newspaper publicity during the last year or two was section 220, which sought to reach the undistributed profits of corporations formed for the purpose of preventing the imposition of the surtax upon the stockholders by accumulating gains and profits instead of distributing them. The section in the 1921 Act was largely ineffective in the chief classes of cases in which it was intended to apply. It provided for the imposition of a heavy tax upon the "net income" of a corporation which was pursuing the practice of accumulating profits instead of distributing them, for the purpose of avoiding surtaxes upon stockholders. One of the chief classes of offenders was the holding company, but inasmuch as the income of a holding company is largely derived from dividends from its subsidiary corporations, there was no method of applying the tax to such corporations since, under the law, dividends received from a subsidiary did not constitute part of the "net income" of the parent company. The result was that the penal tax was merely a percentage of a non-existence net income. The new law remedies this situation by providing that for the purpose of this section dividends received by one corporation from another shall be considered as part of its net income.

Further teeth are put in the section by a provision that the fact that any corporation is a mere holding or investment company shall be prima facie evidence of a purpose to escape the surtax. Under the old law this presumption arose only in the case of a holding company, with the result that many corporations were being formed for the purpose of making investments, and reinvesting the whole or the greater part of the income without distributing anything to the shareholders.

Net Losses

The section permitting net losses sustained during one taxable year to be carried over and applied against the income of succeeding years has been rewritten to remove ambiguities and inconsistencies. Under the old Act capital losses could be carried over as well as a loss resulting from the operation of a business, but, under the new law, capital losses may be used as a deduction for the purpose of computing the net loss only to the extent of the capital gains.

Trusts and Estates

Section 219 of the old law relating to the taxation of trusts and estates is completely rewritten and clarified. The principal new features are: (1) In the case of a trust where the trustee has the discretion to distribute the income or not, the income is taxed to the beneficiary if distributed and to the trustee if not distributed: (2) Where the grantor of a trust reserves the right to change the trust in favor of himself, the income is taxed to the grantor on the theory that the creation of a revocable trust constitutes nothing but an assignment of the right to receive future income. (3) Where the income of a trust may, in the discretion of the grantor, be distributed to him or used for the payment of premiums upon insurance policies on the life of the grantor, such income shall be included in the income of the grantor. These last two provisions are efforts to put an end to a widespread method of evasion of income taxes.

Consolidated Returns

Great difficulty was experienced under the old law in construing the provision that two or more corporations should be deemed to be affiliated for the purpose of making a consolidated return "if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or if substantially all the stock of two or more corporations is owned or controlled by the same interests." This difficulty is set at rest for the future by providing that affiliation shall occur "if one corporation owns at least 95 per centum of the voting stock of the other or others, or if at least 95 per centum of the voting stock of two or more corporations is owned by the same interests."

Allocation of Deductions and Credits

The old law permitted the Commissioner of Internal Revenue to allow the deduction of losses in a year other than that in which sustained when,

in his opinion, it was necessary to clearly reflect the income. The new law extends this theory to all deductions and credits to meet cases of glaring hardship, such as where a taxpayer makes in one year interest or rental payments for a period of years. To force the deduction of the whole amount in the year in which paid often results in his paying either more or less tax than he properly should. The new law, in section 200 (d) provides that the deductions and credits shall be taken for the taxable year in which paid or accrued "unless in order to clearly reflect the income" they should be taken as of a different period.

Taxation of Non-Resident Aliens

Encouragement is given to investment of non-residents in stock of domestic corporations operating outside the United States by the new provision in section 217 which exempts from tax to a non-resident alien individual interest on or dividends from securities of domestic corporations if more than 80 per centum of the income of the corporation is derived from sources outside the United States. Under the old law it was difficult for a United States corporation doing business in a foreign country to attract any capital in the place where they were doing business, since any income received by the stockholder, being received from a United States corporation, was taxable to the non-resident alien in full.

Assessment and Collection of Tax

The provisions of the law relating to the assessment and collection of income tax have been completely rewritten and greatly simplified and many injustices upon the taxpayer removed.

Board of Tax Appeals

Under the old law a taxpayer dissatisfied with the amount of the additional tax found due by the Treasury could appeal to the Commissioner of Internal Revenue. Under the old practice such appeals were referred to a committee in the office of the Commissioner, and in practically every case the finding of the committee was approved by the Commissioner. Under this system the taxpapayer did not feel that he had a review by an impartial body, since the committee on appeals was acting both as advocate and judge. The committee was under a natural temptation to decide in favor of the Government, since in such cases the taxpayer could take the matter to court and sue for the recovery of the tax, whereas, if the decision was in favor of the taxpayer, there was no way in which the Government could test the correctness of the decision. The system was also open to the objection that the taxpayer was forced to come to Washington at undue expenditure of time and money. Under the old system also when the committee on appeals had decided against the taxpayer, he was obliged to pay the tax and sue in court for its recovery. The new law attempts to correct these evils by creating a Board of Tax Appeals, the members of which are to be appointed by the President with the advice and consent of the Senate. The Board is composed of seven members, except that for the first two years the Board may be, in the discretion of the President, increased to not more than 28 members. All members of the Board appointed during the first two years go out of office at the end of two years after the enactment of the Act. The terms of office of the seven permanent members of the Board are to be for ten years. The salary is $7,500. The Board is to be divided into divisions, the decision of a division to be final at the end of 30 days unless, within such period, the chairman of the Board has directed that the decision shall be reviewed by the Board. When the Commissioner has determined that there is a deficiency in a tax payment, he is to notify the taxpayer in writing, and 60 days are allowed for an appeal to the Board. Notice and hearing are given both the taxpayer and the Commissioner, and the hearings before the Board are open to the public. The Board must make a report in writing of its findings of fact and decision, and, if the amount of tax in controversy is more than $10,000, the oral testimony shall be reduced to writing, and the report of the Board shall contain an opinion in writing in addition to the findings of fact and the decision. All the reports of the Board and all evidence received by the Board, including transcripts of oral testimony, are public records, open to the inspection of the public. The principal office of the Board is in Washington, but the meetings of the Board and the divisions are to be fixed so as to allow an opportunity to taxpayers to appear with as little inconvenience and expense as practicable, the intention being that the various divisions shall sit throughout the United States.

If the Commissioner is dissatisfied with the decision of the Board, he may not assess more than the amount found due by the Board, but he may sue the taxpayer to collect the difference. The taxpayer must pay the amount fixed by the Board and may sue to recover any amount which he claims to be excessive.

The system, as originally proposed by the administration, was for a Board of Tax Appeals whose members were to be appointed by the Secretary of the Treasury at a salary of $10,000 a year. Congress reduced the salary to $7,500 and provided that the appointments should be made by the President with the advice and consent of the Senate. The theory of the administration bill was that the tribunal created should be composed of disinterested and competent persons, and that cases should be heard in an informal manner by the members of the Board sitting with the representatives of the taxpayer and of the Commissioner, without the delays and formalities of a court procedure. This theory apparently was abandoned by Congress, and the procedure of the Board, as now constituted, seems to approach closely to the procedure of the courts. It is claimed by many that the provisions giving full publicity to all the proceedings before the Board and all its records will deter many taxpayers from taking an appeal. It is feared that many taxpayers will prefer to pay a tax which they consider unjust, if to obtain relief they must open up the details of their business to their competitors.

The Board is given jurisdiction of appeals from additional assessments of estate taxes as well as income taxes, and has jurisdiction of appeals under prior income tax and excess-profits tax laws as well as under the new law, but has no jurisdiction over claims for refund.

Summary Assessments

Many complaints were made of the practice of the Department, under the old law, of making sum-

mary assessments in order to prevent the running of the statute of limitations against the Government. It was claimed that the Department, when the time within which an assessment could be made had nearly elapsed, would make an arbitrary assessment, without full examination and without opportunity for the taxpayer to present his case. This situation is remedied in the new law by section 277 (b) which provides that the statutory period within which an assessment must be made shall be extended by 60 days if the notice of deficiency has been mailed to the taxpayer and no appeal has been filed with the Board, or, if an appeal has been filed, then by the number of days between the date of the mailing of the notice and the date of the filing of the decision of the Board. If it were not for this provision, the Commissioner, in order to protect the interests of the Government, would be forced to take advantage of section 274 (d) of the law which authorizes the Commissioner, when of the opinion that the assessment or collection of a deficiency will be jeopardized by the delay, to assess and collect the deficiency without giving the taxpayer any appeal to the Board.

Extension of Time for Paying Deficiencies

A liberal provision of the new law is found in section 274 (g) which authorizes the Commissioner, with the approval of the Secretary of the Treasury, to extend for not more than 18 months the time for the payment of any deficiency. The taxpayer may be required to furnish bond and pay interest at the rate of 6 per centum for the period of the extension. This provision is an outgrowth of a temporary provision of the 1921 Act which allowed such extensions only during the period of 18 months after the passage of the 1921 Act.

Publicity of Returns

The new law makes two provisions for publicity of income tax returns in addition to the publicity provided for the proceedings before the Board of Tax Appeals. Section 257 (b) directs the Commissioner to make available for public inspection each year in the office of the collector in each internal revenue district and in such other places as he may determine, lists containing the name and post office address of each income taxpayer, together with the amount of tax paid by him. The old law provided for such publicity only as to the name and address of the taxpayer. Under the old law the practice was to place the lists of these names and addresses not only in the collectors' offices but also in the post office in each county seat. It is believed that the persons responsible for the amendment will be much disappointed if the information provided for by the new law is not also made available at these post offices.

The old law provided for strict secrecy of all income tax returns, providing that they should be open to inspection only upon order of the President. It provided, however, that the proper officers of any State imposing an income tax might, upon request of the Governor, have access to corporation returns. It also provided that bona fide shareholders owning one per centum or more of stock should be allowed to examine the returns of the corporation.

The new law extends the privilege to State officers on request of the Governor whether or not the State imposes an income tax, and it also provides that the Ways and Means Committee of the House, the Finance Committee of the Senate, or a special committee of either House or Senate, may obtain data of any character shown by the returns, and that such committee shall have the right, as a committee or by such agents as it may designate, to inspect the returns, and that any relevant or useful information thus obtained may be submitted by the committee to either House of Congress.

Miscellaneous

Numerous other provisions are found in the law correcting inconsistencies and removing hardships on the taxpayer, such as section 1014 which removes the requirement that only in case of payment of tax under protest may the taxpayer maintain a suit to recover excessive payments, and the provisions of section 1019 allowing interest on refunds made to the taxpayer even though the amount was paid by the taxpayer without protest. Many other provisions are intended to strengthen the hands of the Treasury in collecting the tax, such as section 1002 requiring the Commissioner to require returns or statements under oath and the keeping of records. Under the old law, many, especially small business men, were evading tax by failing to keep any books at all, making it difficult for the Government to secure evidence in a prosecution for a fraudulent return or for a failure to make return.

American Branch of International Law Association

The American Branch of the International Law Association held its annual dinner in New York City at the Hotel St. Regis on the evening of Jan. 9. The following were guests of honor on that occasion: Dr. A. C. D. de Graeff, Envoy Extraordinary and Minister Plenipotentiary from the Netherlands; Dr. Karl von Lewinski, German Agent before the Mixed Claims Commission; Dr. Manley O. Hudson, professor of international law, Harvard University, member of the Secretariat of the League of Nations; Hon. Robert E. Lee Saner, past President of the American Bar Association.

Kellogg Presides Over Moot Court

London, Nov. 18.—Yesterday was "call day" at the Inns of Court, and last night Frank B. Kellogg, the American ambassador, was the guest of the "Benchers" of Gray's Inn, where he was called to the bar.

The proceedings included the interesting ceremony of holding a "moot" trial, at which Kellogg had the honor of presiding over a suppositious case involving a British contractor's liability to carry out further deliveries of whisky to a United States consignee after one of his consignments had been confiscated under the prohibition law.

After hearing arguments, Kellogg gave judgment based on the view of the British courts, that British law could not sanction a violation of the laws of other independent states.—*San Francisco Recorder.*

Woman Appointed Supreme Court Justice

Mrs. Edith L. Wilmans of Dallas has been appointed to the highest judicial bench in Texas by Governor Neff. Justice Wilmans is expected to play an important part in the administration of Governor Mildred Ferguson.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Security Against War*

MISS KELLOR'S two volumes give an exhaustive history of the League of Nations under the Covenant, so far as international disputes are concerned, with a really judicial estimate of essential values. The work is done with the thoroughness which those who know the author have learned to expect from her.

The League has been busily occupied since its organization, with periodical meetings of the Assembly full of discussion, with frequent sessions of the Council.

The main thought in the mind of President Wilson in projecting the League was that it would be a ready means of settling disputes among nations and thus of preventing wars. How far this humane dream has been realized so far may easily be learned.

There have been since the creation of the League many international collisions, some of a grave character. Thirty-seven are recorded, of which all but four in some form were before the Assembly or the Council of the League. Of these thirty-three cases the Council has been the means of settling four. None of these four involved the direct interest of any one of the great powers, and it is hardly likely that war would have resulted from any one of them. However that may be, all of these disputes could and doubtless would have been adjusted by the great powers if there had been no League in existence.

A few contests, none of major importance, were referred to the Permanent Court of International Justice. Practically all the vital disputes were settled by the intervention of the great powers, either individually or by the Conference of Ambassadors.

No dispute in which one of the great powers is a party has been decided by the League. That of Iraq and Turkey, to be sure, in which Great Britain is interested, has been referred to the League and is still pending. At this writing it seems very unlikely that Egypt will succeed in getting its case before the League.

France aided Poland to defeat Russia.

Italy would not tolerate interference by the League in its difference with Greece, but submitted it to the Conference of Ambassadors and the adjudication of the Conference imposed on Greece essentially all the Italian demands.

France occupied the Ruhr and did not allow any interference.

Italy annexed Fiume, and Yugo-Slavia submitted.

The League has its value in discussing various humanitarian matters, no doubt. It has not yet proved of material value in preventing war. The various articles of the Covenant which were intended to enable the League to function in case of international difficulties have thus far been quite futile.

Article 10 of the Covenant provides a mutual guaranty by all League members of the territorial integrity and existing political independence of each. To this article the Senate of the United States when the Treaty was pending proposed a drastic reservation, but President Wilson regarded the guaranty as the heart of the League and would accept no qualification. Thus far Article 10 has been quite impotent—no one of the allied states has been willing to act under its provisions.

Article 12 of the Covenant stipulates for arbitration or for inquiry by the Council in all dangerous disputes, and the members of the League "agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council." This provision it was supposed would "outlaw war" by delay.

"Whatever the theory, no affirmative action of any kind ever having been taken under this article, its usefulness at the end of five years is entirely a question of the future, especially in view of the fact that during that time there were seven instances in which resort was had to military force in which a member state was the object of aggression; seven instances in which a member state was an aggressor upon the territory of another country; and on five occasions territory temporarily ceded to the allied powers was the object of aggression." (Vol. I, p. 11).

As a means of preventing the hostile collision of states thus far the League of Nations is benevolently impotent.

In spite of this experience, or perhaps because of it, the League is now proposing to abolish aggressive war altogether. Aided by a group of American citizens who had not the advantage of being authorized by their own government, the League has approved and submitted to the various states a protocol to be adopted as a treaty supplementary to the Covenant. The purpose of the protocol is explained by one of its proponents.

"Our purpose was to make war impossible, to kill it, to annihilate it. To do this, we had to create a system for the pacific settlement of *all disputes* which might ever arise. In other words, it meant the creation of a system of arbitration from which no international dispute, whether judicial or political, could escape. The plan drawn up leaves no loophole; it prohibits wars of every description and lays down that all disputes shall be settled by pacific means."

Thus all agressive war is to be annihilated.

But what constitutes aggressive war? How many wars have there been which both belligerents have not declared to be defensive? On the face of it these would seem questions not easy to answer,

*_Security against War_ by Frances Kellor and Antonia Hatvany, Collaborator. Vol. I.—International Controversies. Vol. II.—Arbitration, Disarmament, Outlawry. New York, Macmillan, 1924. $6.00.

but they are disposed of quite cheerfully by the protocol. Compulsory arbitration or compulsory adjudication by the Court is provided for all cases. Refusal to submit to such settlement constitutes aggression, and exposes the recalcitrant state to sanctions provided by the protocol and by the Covenant.

Does this concern the United States?

Article 17 of the Covenant provides that if there is a dispute between a member of the League and a state which is not a member of the League, the latter may be invited "to accept the obligations of membership in the League for the purpose of such dispute, under such terms as the Council may deem just."

"If a State so invited shall refuse to accept the obligation of membership in the League for the purpose of such dispute, and shall resort to war against a member of the League," such state shall *ipso facto* be deemed to have committed an act of war against all other members of the League, and the sanctions of the Covenant shall apply. Thus the Covenant; and Article 16 of the Protocol take over the same conditions.

So the United States against its will might be dragged in before arbitrators of the League. But the grievance in question might be perhaps a tariff system, or an immigration statute, which the United States might claim to be a wholly domestic matter and therefore not subject to arbitration. This the arbitrators would, under the protocol, at once refer to the Permanent Court of International Justice, through the medium of the Council; and the decision of a court may go either way.

Will the United States consent to refer to arbitration questions of its vital national integrity?

The Committee of Americans would exempt from the jurisdiction of the Court "matters of governmental, domestic or protective policy." For the United States such exemptions would include "the Monroe Doctrine, conservation, immigration, right to expel aliens, tariff, right to maintain military establishments, coaling stations, other means of self defence, fortification of the Panama Canal and right to discriminate between natives and foreigners with regard to citizenship, property rights and other matters of like character."

The United States will hardly permit the League of Nations to summon it to a court for the adjudication of such matters. But if the United States sees fit to defend its vital domestic interests by force, there is war, and "the plan prohibits wars of every description and lays down that all disputes shall be settled by pacific means."

The plan it is to be feared is not a vision of the promised land, but is a mirage.

In short, all such elaborate counsels of perfection have an obvious flaw—they ignore plain facts of diversity of fundamental character and motive throughout the nations of the world.

Miss Kellor and her collaborator have done a useful piece of work and have done it well.

HARRY PRATT JUDSON,

The University of Chicago.

The International Labor Office of the League of Nations has already made a name for itself as one of the most useful, although inconspicuous, outgrowths of the Treaty of Versailles. Since 1919 it has gathered together all legislation in any way bearing on industrial or labor conditions, throughout the world. In the same manner it has collected similar provisions in constitutions and in international treaties and conventions. Each such item has then been translated and published as a separate pamphlet, with the necessary citation to the original material. At the end of the year all such pamphlets have been gathered together and bound as one volume, after again making sure that no omissions have occurred. The result is a grouping of material to be had by no other means, and invaluable for purposes of comparison when changes in legislation are contemplated. The editors have placed accuracy and assurance of completeness first, hence they have been unable to publish the complete volume without some delay. The compilation for 1922 has just appeared, under the name of *Legislative Series Volume III, 1922.* Thirty-eight countries (including League of Nations mandated territories) are represented. The extremely heterogeneous mass is made wieldy by several carefully prepared indexes, by countries, chronological, and topical. The book can be secured from the International Labor Office, Lenox Building, Washington, D. C. ($5.00. $7.50 for year's subscription to pamphlets, with complete volume at end).

The Reasonableness of the Law, by Charles W. Bacon and Franklyn S. Morse. New York. Putman. Pp. xii, 400. $3.00. The authors in their preface state that the thesis of this book appears in its title. "Law is the application of reason to the problems of social control. In these pages an effort is made to show how reason has directed the extension of the rules of law to meet changes in social and economic conditions."[1]

But what does "reasonableness" mean? In any given situation a development that will seem reasonable to one man may seem most unreasonable to another, depending on the norms of decision used. Certainly the believer in strict logic, with changes entrusted to the legislature alone, will have very different ideas from the believer in the sociologic and economic harmony of law. Before we can tell whether the law develops reasonably the authors should show us what that word means. Passing over this the book (which is made up in about equal proportions of the authors' own text and quotations from opinions) ranges through many fields of the law, such as constitutional law, statutes, international law and equity, to show how their changes and modifications have been directed by reasonableness. Usually the change, whatever it is, is merely stated. The reader is allowed to decide for himself whether it was a reasonable one. The maxims of equity get twenty-one pages of text. The entire field of torts a half a page.

E. W. PUTTKAMMER.

1. The quotation is slightly rearranged and abridged.

The Constitution in Schools

Plans of the Missouri State Bar Association for introducing the study of the Federal Constitution, and the study of the State Constitution, in the public and private schools of the State, as a required subject, have been outlined.

Twenty-eight states now require such instruction to be given in their schools, and it is proposed that Missouri be the twenty-ninth.

NATHAN CLIFFORD: A TRIUMPH OF UNTIRING EFFORT

Career of the Late Associate Justice of the U. S. Supreme Court—Convincing Example of What Can Be Accomplished by Perseverance in Absence of Extraordinary Gifts or Adventitious Aids to Success

By WALTER CHANDLER
Of the Memphis, Tennessee, Bar

THOMAS CARLYLE wrote that great men, considered in any way, are profitable company, and that we cannot look, however imperfectly, upon a great man without gaining something from him. It is not for this reason alone that lawyers who are native of the South will be interested in the life of Nathan Clifford, lawyer, statesman, Justice of the Supreme Court of the United States, and life-long Democrat.

History has overlooked in a large measure the story of Nathan Clifford, because he was not of the mould of which popular heroes are made. Not brilliant, his career is convincing of what can be accomplished by untiring effort and perseverance, in the absence of extraordinary gifts, or adventitious aids to success. Today, he would be described aptly as a plodder. He never voluntarily gave up any task that he undertook, and he made his difficulties stepping stones to higher achievements.

Born of poor parents in the village of Rumney, New Hampshire, in 1803, (the only boy of seven children), Nathan Clifford found himself without the possibility of a thorough education, but blessed with a vigorous constitution and an unlimited capacity for hard work. His father intended for him to be a farmer, but, when Nathan reached the age of fourteen, he begged so fervently to be allowed to continue his studies that he was sent to Haverhill Academy for three years. With this foundation, he taught school and gave singing lessons to defray his living expenses while studying. Unable to go to college, young Clifford followed the curriculum of Dartmouth College and kept abreast of the course of the class in which he would have entered had his financial resources been sufficient.

At the age of eighteen, Clifford went into the office of Josiah Quincy, a prominent lawyer of his home district, and completed the five years' study of law required by the Statutes of New Hampshire before being permitted to practice. Having procured his law license, Mr. Clifford's next step was to find a place to "hang out his shingle." The nearest town of importance was Newfield, Maine; and, using the two strong legs with which Nature endowed him as his means of transportation, and a large pocket handkerchief suspended from a stick as his valise, Clifford set out for his new home more than thirty miles away. Good fortune awaited him there, because he secured living quarters in the home of a prominent Newfield citizen, and within a few months married his daughter.

The natural bent of Mr. Clifford was toward a political life, and, although his prospects in the legal profession were very good, he could not resist the temptation to enter politics. His up-bringing and his condition in life consequently led him to embrace the party of the people rather than that of the Federalists, and in 1830, he was elected to the Maine Legislature on the Democratic ticket. Having cast his lot with the Democratic party after mature deliberation, Mr. Clifford never once swerved from the faith. He believed implicitly in party loyalty, and, for the following fifty years, through the strife and turmoil of the Civil War, he never wavered in his convictions. He felt that the good of the Nation would be served best by the political principles of Jefferson rather than those of Hamilton and Adams.

Space will not permit a review of Mr. Clifford's activities in the Legislatures of 1830, 1831 and 1832, but, in reading the records of these years spent by him there, it is evident that his position at the close was one of prominence in that body. In fact, in 1832, he was elected speaker pro tem by a vote of ninety-four to twenty-seven. In this year also, Mr. Clifford was chosen a delegate to the first national convention of the Democratic party in Baltimore. He attended that gathering, and was enthusiastic in his support of Andrew Jackson and Martin Van Buren, to both of whom he was ever steadfast.

Later in 1832, Mr. Cifford was re-elected to the Legislature, and was chosen Speaker of the House. He was then but twenty-eight years of age. Although filled with great ambition, he was aware of his inexperience, and fortified himself by the exercise of much conservatism in all his official acts. As evidence that his course as presiding officer of the Maine House of Representatives met approval, Mr. Clifford was re-elected Speaker in 1834. This office developed in him no little self-confidence, and brought him an acquaintance all over the State. The direct result was his appointment as Attorney General of Maine. He held that office, (which paid a salary of $1,000.00 a year) until 1837, when he became a candidate for the United States Senate, but was defeated. It seems that, in the early days of Maine, the Court perambulated over the State, and that the Attorney General and the three Supreme Court Justices took part in the nisi prius trials of criminal causes involving the possibility of capital punishment, and that, occasionally, all of the judges charged the jury.

The duties of Mr. Clifford as Attorney General required close study of the law, and the reputation that he gained would have brought him a lucrative practice had he been able to cast aside the allurements of politics and cling only to the "jealous mistress," but he could not resist the temptation to run for Congress in 1838, when he was elected after a very spirited contest. Two years later, he was re-elected, but the State of Maine was lost by the Democrats to the Whigs. Because of a division in the Democratic party in Maine

*Address delivered at annual meeting of Tennessee Bar Association on June 14 at Chattanooga, Tenn.

in 1842, Mr. Clifford was defeated, and returned to his practice.

In 1846, the split in the Democratic party made it necessary for President Polk to offer to the Van Buren wing a cabinet post to harmonize the party for the presidential election of 1848. Accordingly, when a vacancy occurred in the office of Attorney General of the United States, Mr. Clifford was chosen. Very shortly after undertaking the duties of the office, however, he recognized its great responsibility and realized his limited qualifications, and went to the President and tendered his resignation for fear that he might embarrass the administration of his Chief. The President declined to accept the proffered resignation, and, his usual confidence thus restored, General Clifford plunged into the task of mastering branches of the law with which he had had little previous contact. He succeeded admirably, and became a trusted counsellor of the President.

Of the many important causes before the Supreme Court of the United States while Nathan Clifford was Attorney General, the one creating the greatest public interest was that of Luther vs. Borden, 7 Howard, growing out of the so-called Dorr's Rebellion in Rhode Island. The real question was popular sovereignty, the right of the people to change, in their own way, their form of Government. Daniel Webster was leading counsel in opposition to Dorrism, and General Clifford was the principal advocate of the Dorr Party. Although the Court, in an opinion by Chief Justice Taney, determined the issues against General Clifford's contentions, the latter's argument was termed by eminent lawyers who were present, one of whom being Henry Clay, to have been "one of the most powerful efforts ever made in that forum on any great constitutional question."

One other case before the Court, in which General Clifford appeared for the Government, will be mentioned because of its curious facts—Brashear vs. Mason, 6 Howard 92. When the State of Texas was annexed to the United States, it was the proud possessor of a Navy consisting of four war vessels, and in the annexation resolution it was provided that Texas should cede this fleet. Plaintiff was Commander-in-Chief of the Texas Navy, and claimed that he was part of the property ceded, and that, accordingly, he passed into the Naval Service of the United States, thereby becoming entitled to pay as an officer. The Court held that the word "Navy" did not comprise persons, and also that mandamus would not lie to the Secretary of the Navy to enforce payment.

It was at this time that the Mexican War was engaging the attention of the Country, and the Attorney General favored a determined and aggressive course toward our enemy on the South, and so expressed himself at the Cabinet meetings. General Clifford's influence played no small part in bringing about a prompt and decisive end of the conflict. In negotiating for a settlement with Mexico following the war, the State Department made the unfortunate error of sending the Chief Clerk of that Department to Mexico to carry on the negotiations. He lacked tact and diplomacy, and brought on the administration no little embarrassment because of a distinct breach which occurred between him and General Scott, and also by reason of the fact that he declined to return to the United States after being recalled from the post. Instead, he remained in Mexico and, without authority, negotiated a Treaty. Finally, the Treaty was submitted to the Senate and ratified with certain amendments. It then became necessary to select a commission favorable to the Administration to go to Mexico and bring about a final settlement of the differences growing out of the war and to exchange ratifications with the Mexican Government on the amended Treaty. This duty was entrusted to Mr. Clifford, and to Colonel Ambrose H. Sevier, Senator from Arkansas, who rose to the responsibility and discharged very efficiently the difficult task. Because of the serious illness of Senator Sevier, General Clifford proceeded to Mexico alone, and was sole commissioner until joined by his associate.

A trip to Mexico in that day and time was not without its dangers, and an element of courage was necessary to the character of an envoy. That Mr. Clifford did not lack this quality was demonstrated by his driving off a band of robbers who had surrounded the stage in which he was riding near Mexico City. His unexpected resistance put an end to the purpose of the bandits when their leader was shot by the ambassador.

Mr. Clifford held the post as Minister to Mexico until after the election of General Taylor, when he resigned as all good Democrats did in those days upon the election of a new President from an opposite political party. Mr. Clifford re-entered the practice of law, going from his former home at Newfield to Portland, which was the most important city in the State. There, he built up a good practice, and took an active part in politics. He made three additional efforts to gain a seat in the United States Senate; was defeated on the first two trials by Hannibal Hamlin, and in the third by William Pitt Fessenden in 1853. Perhaps the most important service which Mr. Clifford rendered to the Democratic Party at that time was to cement the various factions of that organization, thereby contributing to a considerable extent toward the election of General Franklin Pierce in 1852, and to the success of Mr. Buchanan in 1856. Mr. Clifford made a number of speeches for the latter, and was one of the Democratic Party's most prominent advisors in that campaign.

The slavery question at this time had become an important issue, and Mr. Clifford's attitude on this question, like that of many other Northern Democrats, has been misrepresented and misunderstood. Though he did not believe in slavery, he did believe that it was a local issue and that the Federal Government had no right to dictate to the States whether the practice should be allowed within their borders. He believed, too, that agitation in the North against slavery could have no other effect than to widen the breach between the North and the South. He opposed every encroachment of the Federal Government upon State Sovereignty, but he was never an advocate of secession.

In passing, it might be stated that Mr. Clifford was unalterably opposed to a high tariff, and contended that the soundest principles of economy, as well as of justice, were counter to it.

In 1858, Mr. Clifford was appointed to the Supreme Court of the United States by President Buchanan, occupying the place vacated by Benjamin R. Curtis, the writer of the dissenting opinion in the Dred Scott case. To say that the choice of Mr. Clifford to succeed a gentleman of Mr. Curtis' intellectual attainments and polished manners was popular would be to distort the facts. The differences between the two men, both in point of early life, education, environment and political beliefs, was marked. "It has been said that no man ever went upon the Supreme Bench amid such a deluge of abuse as did Judge Clifford." "Pot house Democratic politician," "A miserable dough

face," "A Northern man with Southern principles," "A mere demagogue," were some of the terms applied to him by newspapers at the time, but his nomination was confirmed finally by the aid of many who differed with him in political beliefs, including his opponent of a lifetime, William Pitt Fessenden. The qualifications of Judge Clifford as a lawyer were vigorously attacked. It was pointed out, for example, that he had never acted as counsel in a patent or an admiralty case. He lived to become an authority on these two branches of law, and his opinions today are the subject of unstinted praise from leading admiralty lawyers. Furthermore, the law of "Bills and Notes," as it stands now, owes much to his progressive interpretation.

In answer to the question as to whether Judge Clifford was a proper man to place on the highest tribunal in the Country, the discussion of his biographer on this subject is interesting, and should be quoted:

> While it might be admitted that such fears were natural, though as subsequent events showed, unfounded, it should be borne in mind that appointments to the Supreme Court are made on other grounds of fitness than mere success as a practicing attorney. A large and most important part of the work of that body is passing upon the constitutionality of questions brought before it. In this function, it is the pioneer tribunal of the world. At the time of the adoption of the Constitution the idea that a judiciary should have the power to declare void certain acts of a legislature was entirely new. No such power exists today in England, where an Act of Parliament is the supreme law of the land, and no bench at present exercises that to the extent and with the far reaching consequences customary to the Supreme Court of the United States.
>
> These circumstances, which are not always realized by persons who freely criticize the selection of justices, make two qualities essential to the nominee to the highest American tribunal. Firstly, because of the opposite views as to the construction of the Constitution already referred to, the President of the United States is bound to choose a man thoroughly saturated with the tenets of the faction in power. To do otherwise would be folly, for if one believes that a strict adherence to the letter of the instrument is the only safe course for the ship to steer, the elevation of a man of opposite persuasion would be the doing of an act detrimental to the Country. Secondly, owing to the peculiar nature of the power of the Court, statesmanlike abilities are of the very highest importance.
>
> At no time in the history of the nation had political partisanship been more strictly adhered to than in the period just preceding the Civil War. The Republican party had come into being with the avowed purpose of putting an end to the extension of slavery. In Democratic eyes, the agitation of this question had been the cause of all the trouble and controversies which had arisen in Congress since the Missouri Compromise. Negro servitude was a local institution; and, right or wrong, the central government had no legal means of ending it. It was a most dangerous and subversive doctrine, this one of the new group, and yet it was gaining strength and power every day. The liberty of the citizens and the integrity of the Union demanded that the men who had to interpret the laws of the land in the last instance should be of the true faith. They must not only be Democrats; they must believe in Jacksonian principles as in a creed, if the country was to be saved.
>
> The two qualities above mentioned were very markedly in evidence in the character of Judge Cliffford. From the time of his admission to the bar he had clung to his party with a tenacity of devotion almost religious. In his eyes its doctrines could preserve the union of the States. Adoption of other principles would destroy it.

To appreciate Judge Clifford's service upon the Court, the influence he had and the unique position which he occupied there, a study of its personnel is necessary. In 1858, Roger B. Taney was Chief Justice. He was the immediate successor of John Marshall, and represented the swing from Federalist implied powers to Jeffersonian strict construction. The Chief Justice and six of the seven associates had been chosen by Democratic Presidents. Judge Clifford lived to see all of these men die or resign, and was the only man whose commission ante-dated the Civil War—the single link which bound the Court to the times of Jackson.

"To one of such strong convictions his position thus became a sacred trust to use what power he had to keep alive the flickering flame of the faith to which his first and abiding allegiance had been sworn. To this task he set himself steadfastly, never hesitating to write a dissenting opinion when the decision of the majority seemed to him to be contrary to the true principles of the Constitution." "His age, long experience, integrity and high character, his unfailing courtesy and absolute fairness gave him a standing second to none, in spite of his political beliefs. During the illness and absence and after the death of Chief Justice Chase, he became the acting head of the Court. There was a desire expressed by his friends that he might be offered this supreme honor. Such a culmination of his career was, however, under all circumstances impossible. His long life drew to its close, while he, refusing to resign and accept from the Government he had served so faithfully the life of ease to which he was entitled, fought on, but died too soon to see the accomplishment of the hope of his later years, the return to power of the party whose standard he had always followed. There is a pathos in the picture of the old warrior with his back against the wall struggling against tendencies which he could not overcome, and one's sympathy goes out to him as to John Marshall during the last years of his judgeship when he found himself in a similar situation as to Federalist doctrines."

The mere mention of the Constitutional decisions of the Supreme Court during the twenty-three years of Mr. Clifford's tenure will bring vividly to the mind of the lawyer the important questions before that body at that time. The California Land Title Cases, Ex Parte Merryman, The Prize Cases, The Bank Tax Cases, Pacific Insurance Company vs. Soulé, Ex Parte Milligan, Cummings vs. Missouri, Ex Parte Garland, Texas vs. White, The Legal Tender Cases, The State Test Oath Case, The Slaughterhouse Cases, Davidson vs. New Orleans, and The Granger Cases, all reflect the efforts put forth by the members of the Court, and the views of Judge Clifford in these far-reaching determinations contained his fundamental legal and political beliefs. An analysis of these decisions shows the influence of Judge Clifford with his associates whose party affiliations were different from his. The majority opinions maintained a wise balance between national and state sovereignty, and witness his judicial strength and his sympathy with southern political principles.

Let those who complain that the Supreme Court has not protected the rights of minorities, read the history of the Court from 1860 to 1875. Contrary to pupular clamor in the North, and in restraint of the fever heat engendered by the Civil War, the Court stood against the bitter partisan feeling that would have legislated punishment on the Southern minority, and courageously saved to the South its constitutional privileges.

It is hard to conceive of a more difficult position than the one occupied by Mr. Justice Clifford during the Civil War. Imbued with the tenets of his own party, accused of being in sympathy with the South, condemned by Democrats as well as Republicans, it must have been to Jeffersonian strict construction. The Chief Justice and six of the seven associates had been chosen by

ernment in the prosecution of the War, and yet this was exactly what he did.

The literary style of Judge Clifford's opinions is characteristic of his life. They represent an enormous amount of study, unadorned by brilliancy. "They move on slowly, sometimes almost ponderously, but always irresistibly from premise to conclusion. He did not have the ability in a comparatively few words to set forth an idea teeming with suggestiveness and originality. Still, he was complete master of any subject upon which he chose to write or speak, for he made himself familiar with every side of it. Therefore, when he wished to express an idea, he took the same route that he had used in acquiring his own information. He began at the beginning and marched by careful stages through every phase or contingency. The result was that when he arrived at his conclusion, there was no point which had not been covered." His public utterances were devoid of impassioned oratory, but his thorough-going discussion of the subject in hand was very persuasive to an earnest searcher after the truth.

No account of his judgeship would be complete without mention of the great mental labors performed by him while on the bench. At the time of his appointment most of his associates were old men, and the docket was crowded. To this situation Judge Clifford came, a man fifty-four years of age, in perfect health and with a singular willingness to do real work. Largely through his assiduity, business was reduced to the dimensions of current matters, and the Court found itself able to resume its custom of sitting during vacation in the Circuit to which the Justice was assigned. Another fact emphasized Judge Clifford's administration of his office. Every lawyer knows that a petulant, impatient or arbitrary manner upon the bench often renders it impossible for counsel properly to discharge their duty to their client or to do justice to themselves. "A correct judicial behaviour is more than a mere matter of etiquette." Judge Clifford's attitude was characterized by uniform courtesy. He was considerate and at the same time dignified and self-respecting. His kindness to all lawyers, especially the young men, was well known.

It would not be proper to close this brief review without mention of Justice Clifford's part in the deliberations of the Electoral Commission following the Tilden-Hayes contest. As Senior Justice of the Supreme Court, Mr. Justice Clifford presided over the Commision. At no time in the history of the Country has there been as much political manipulation as there was in making up the personnel of that body. The political division was so close that it has been said that the history of the Commission from the time of its first sitting to that of its adjournment is told by the figures eight to seven.

The most important question which the Commission had to decide was whether it had the power "to go behind the returns" submitted by the electors in the doubtful States and opened by the President of the Senate in the presence of the Commission and the two Houses. This was decided in the negative as to the Florida returns, with a strong dissenting opinion by Judge Clifford, who insisted that the evidence to prove fraud or forgery of the certificates of election should have been admitted. When one considers the facts, he is led to believe that the determination not to go behind the returns had strong Constitutional authority as well as practical wisdom, but to one having knowledge of the facts, it was evident that Judge Clifford had seen behind the returns and knew what an investigation would develop. As the presiding officer, all parties were unanimous in commending Judge Clifford's fairness and impartiality. It was no easy matter to conduct hearings in such a cause in a way to satisfy counsel on both sides, particularly when one felt as strongly as did Judge Clifford. Nevertheless, his qualification as a judge was manifest, and no word of criticism has been spoken of the manner and substance of his conduct as the presiding Judge in that fateful trial.

Judge Clifford continued to be very active on the Supreme Court Bench until a few months before his death in July, 1881, and, up until the time that he was stricken with paralysis, his tireless energy never seemed to wane. Concentration to him was not the strain that it is to most men. A mental task once begun absorbed all his thoughts, and "it may well be doubted if a tribunal in any Country has ever been favored with a judge who, for the same length of time, devoted as many hours to the laborious duties of his office as did Judge Clifford." So true is this that the ordinary working time of the day did not suffice, and, after his appointment on the Supreme Court, Judge Clifford was in the habit of rising early and doing two hours study before other people were about; and he often extended his period of labor well into the night. As a help to his industry, he was endowed with a capacious memory.

The outstanding qualities which Judge Clifford brought to the discharge of the duties of the various offices which he filled were rugged honesty, unfailing good sense, and great love of justice. His great recompense, aside from the satisfaction that comes from good work well done, was the esteem of his fellow countrymen, and he asked no more. By rigid economy, he was barely able to support his family in a manner appropriate to the dignity of his position, and to give his children better schooling than he had received. It can scarcely be doubted that, had he so wished, he might have amassed a comfortable fortune by the practice of the law, but he chose to serve his Country rather than himself, and there is no evidence that he ever regretted his choice.

Judge Clifford's family life was very happy, and he was rewarded by the fact that his children grew to maturity and reflected credit on their parents. One of his sons, William H. Clifford, became a prominent New England lawyer and was the editor of the four volumes of Clifford's Reports, which contain his father's decisions while on the Circuit.

It must have been a great satisfaction to Judge Clifford to have been the recipient of the degree of Doctor of Laws from Harvard, Dartmouth, Brown and Bowdoin. These institutions magnanimously recognized that greatness and learning did not depend exclusively on a college education, and offered their honors to show unqualified approval of the works of a great and good man who made the most of his opportunities.

Finally, to us of today, the life of Nathan Clifford is a striking example that industry, unswerving integrity, dauntless courage, and persistence to the end will go far in overtaking the possessor of the spark of divine fire called genius, or the owner of a goodly share of worldly goods, who has no trail to blaze, no thirty mile "hike" to take, and who need not burn the midnight oil for an education. As Judge Clifford's qualities of character were necessary for his own success, so are they still necessary for ours. No lawyer can succeed without the old-fashioned honesty, and the manly courage to give that honesty life and vigor.

CANONS OF ETHICS FOR PATENT LAWYERS

WE print below as a matter of timely interest the report of the Committee on Ethics and Grievances of the Chicago Patent Law Association and the Code of Professional Ethics for practitioners of Patent Law proposed by this committee and adopted by the Association on Dec. 12, 1924. There is a movement on foot to have these canons or something similar adopted generally throughout the country.

Report of Committee on Ethics and Grievances of Chicago Patent Law Association

This Committee was appointed by this Association on March 25, 1924, without definite instructions, but we drew certain inferences from our designation. We at once communicated with the various Patent Law Associations to ascertain if there were any similar committees in other associations. We found that the Cleveland Patent Law Association had a committee of which Mr. George W. Saywell was Chairman, who had drafted a tentative code of professional ethics for the government of its own members.

We wish here to make acknowledgment of our indebtedness to the Cleveland Association, and Mr. Saywell in particular, for much of the suggested code which follows. We consider the work of the Cleveland Committee so admirable, that we have not hesitated to adopt as much of it as seemed appropriate for a general code.

We also suggested to the various Patent Law Associations that they appoint Committees on Ethics and Grievances and send delegates to the meeting of the Section of Patent, Trade Mark and Copyright Law of the American Bar Association at Philadelphia on July 7, 1924. The result was that a number of men were present at the Philadelphia meeting who were prepared to discuss the matter. We had prepared in advance printed copies of the suggested code which we had drafted. Several conferences followed, and while our proposal was in the main approved, suggestions were made for its betterment which we were glad to adopt. These are included in the attached draft.

There is no doubt that the practice of Patent Law needs a housecleaning. The American Bar Association's Canons of Professional Ethics, in theory at least, govern the conduct of all members of the Bar, but little attention seems to be paid to them by many Patent lawyers. No reason occurs to us why a code of ethics, designed to regulate the conduct of the Bar, should not be of general application and govern the whole Bar and not a part of it.

One need only look through the advertising section of certain magazines of general circulation to realize how utterly the canon against promiscuous advertising is being violated, and the nature of the advertising of many who certainly pretend to be, and perhaps are, members of the Bar, would discredit a quack doctor.

The practice of soliciting Patent Law business by corporations or groups of laymen, who are not bound by any professional restraints and, like a padrone, hire members of the Bar or licensed Patent Office practitioners to do the business thus secured, would not be possible unless there were lawyers willing to prostitute themselves. The sending out of circulars, volunteering advice (usually bad), particularly in trade mark matters, uninvited recommendations of opposition and other contested proceedings, without any personal or professional relationship with the person addressed, and without any knowledge of the facts of the case, are growing disgustingly frequent; even employing salesmen and touts to travel about and canvass for business —the Patent Law analogue of ambulance chasing— is not uncommon. These things are indecent.

If the respectable element of the profession keeps silent and thus apparently condones such practices, everyone will be judged by the conduct of the comparatively few, and all will justly be considered equally disreputable.

These things are not mere disregard of the conventions, or exhibitions of bad taste; they are symptomatic of serious abuses which have grown up in the practice before the Patent Office. These unconscionable methods of getting business are naturally followed by equally unconscionable exploitation of the business thus obtained; proceedings are needlessly protracted, prolix and expensive. there is too much done and encouraged for revenue to the practitioner, and not for service to the client. In short, there is beginning to be more than a grain of truth in the reproach that the practice of law is degenerating from a public profession into a mere money-getting trade.

In order to crystallize decent professional opinion, we submit the following Code of Professional Ethics and recommend its adoption by this Association. If it be said that it is too specific and concrete, the answer is that the acts at which it is aimed are specific and concrete.

Respectfully submitted,

JOHN H. LEE,
EDWARD S. ROGERS, Chairman,
GEORGE L. WILKINSON.

Canons of Professional Ethics for Practitioners of Patent Law Adopted by the Chicago Patent Law Association December 12, 1924

Preamble

The Canons of Professional Ethics of the American Bar Association are hereby adopted and shall, whenever applicable, control the conduct of every practitioner before the Patent Office and in the Courts. To the reasons set forth in the preamble to the Canons of Professional Ethics of the American Bar Association, there is added the following: The Patent System is so important and so far-reaching in its influence, and its success is so dependent upon merited public approval, that it should be brought to and maintained at a high point of efficiency. It should be so administered as to inspire public confidence in its integrity and impartiality. The character, reliability and professional standards of persons holding themselves out as qualified to practice in the Patent Office and in the Courts should also inspire and deserve public confidence.

As an aid to these desirable ends, the following Canons of Ethics, supplementary to the general

Canons of the American Bar Association, are also adopted as a guide for the conduct of practitioners of the Patent Law, whether in the Patent Office or in the Courts.

Advertising

1. All advertising or soliciting of business should be limited to the use of business cards, or their insertion in directories or business guides, including business listings of newspapers. These cards and advertisements should contain only the name, address and telephone connections of the circulator or advertiser, and a statement of the professional service offered. No reference for advertising purposes should be made to membership in any Professional Association, or to any activities therein.

Soliciting Business

2. Any circularization of the public, offering advice before it is asked or volunteering information regarding patent, trade-mark or copyright law, or instructions relating to applications for patent or registrations, or making any other unsolicited approach, is improper.

3. Stimulation of the development and patenting of inventions by the enumeration of inventions alleged to be desired by the public, or the citation of instances of great profit made by inventors, or the offering of services for grossly inadequate fees (whether or not the fee shall be increased in the event of success), for the purpose of securing business; or cultivating business by a "no patent—no pay" guarantee; or offering to publish or sell the patent when secured (unless the offer is reasonably explained and subjected to proper reservations) is improper.

4. Recommending trade-mark opposition or cancellation proceedings, except when justified by personal or professional relations (and then only in obviously proper or debatable cases) is condemned. Hunting up or developing other possible Patent Office *inter partes* proceedings and advising action thereon unless warranted by personal or professional relations is also condemned.

Encroaching Upon Another's Practice

5. Efforts, direct or indirect, in any way to encroach upon the business of another are unworthy of those who should be brother practitioners. It is not unethical however at the request of a client, to accept employment in matters already in the hands of other counsel after communicating with the counsel already employed.

Duty to the Uninformed Client

6. The uninformed or inexperienced client should be told whether or not it is advisable to have a preliminary examination made before incurring any application expenses, and if such examination is made, actual copies of the pertinent references should be furnished to him. If, in the opinion of the solicitor, the invention submitted is substantially anticipated, the client should be so advised, and discouraged from filing an application.

Foreign Applications

7. It is improper to encourage the filing of applications for foreign patents without fully informing the client of recurrent taxes, workings, and other requirements of foreign laws.

Misconduct of Attorneys

8. To uphold the honor of the profession and to improve its administration, it is the duty of every practitioner who may have knowledge of any violation of Section 487, as amended February 18, 1922, 67 Statutes at Large, or by Rules 17 (h) and 22 (c) of the Rules of Practice, U. S. Patent Office,* to inform the appropriate tribunals thereof and to assist, if requested by the proper officials, in the presentation of the facts concerning any such acts, to the end that the offenders may be warned, reprimanded or disbarred.

Attitude Toward the Patent Office

9. It is the duty of every practitioner before the Patent Office to be as concise and direct as possible in the prosecution and disposition of all cases. Frankness toward the Patent Office should always be observed. It is also the practitioner's duty, whenever any controversy of any nature will admit of fair adjustment, to advise the client to avoid or to end the litigation.

Use of Corporate or Fictitious Names

10. Patent, trade-mark and copyright services being largely a matter of personal relations and mutual confidence between the solicitor and the client, it is improper to perform any professional services under any corporate name or other title than one's individual or partnership name. Firm names should include only the names of present or past active partners.

11. Partnerships or other associations for the performance of professional services either in or out of court, should not hereafter be formed between members of the Bar and non-members.

Firm names or titles which include the name of a person not a member of the Bar should not be used.

This canon is made of future application, only for the purpose of preventing injustice which might

---

*Sec. 487, as amended, is as follows:

Patent-agents or attorneys; rules and regulations for; suspension or exclusion from practice.—The Commissioner of Patents, subject to the approval of the Secretary of the Interior, may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing applicants or other parties before his office, and may require of such persons, agents, or attorneys, before being recognized as representatives of applicants or other persons, that they shall show that they are of good moral character and in good repute, are possessed of the necessary qualifications to enable them to render to applicants or other persons valuable service, and are likewise competent to advise and assist applicants or other persons in the presentation or prosecution of their applications or other business before the office. And the Commissioner of Patents may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case, from further practice before his office any person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who refuses to comply with the said rules and regulations, or who shall, with intent to defraud in any manner, receive, mislead or threaten any applicant or prospective applicant, or other person having immediate or prospective business before the office, by word, circular, letter or by advertising. The reasons for any such suspension or exclusion shall be duly recorded. And the action of the commissioner may be reviewed upon the petition of the person so refused recognition or so suspended or excluded by the Supreme Court of the District of Columbia under such conditions and upon such proceedings as the said court may by its rules determine.

Patent Office Rule 17-h is as follows:

Every attorney registered to practice before the United States Patent Office shall submit to the Commissioner of Patents for approval copies of all proposed advertising matter, circulars, letters, cards, etc., intended to solicit patent business, and if it be not disapproved by him and the attorney so notified within 10 days after submission, it may be considered approved.

Any registered attorney sending out or using any such matter, a copy of which has not been submitted to the Commissioner of Patents in accordance with this rule, or which has been disapproved by the Commissioner of Patents, shall be subject to suspension or disbarment.

Patent Office Rule 22-c is as follows:

For gross misconduct the Commissioner may refuse to recognize any person as a patent agent, either generally or in any particular case; but the reasons for the refusal will be duly recorded and be subject to the approval of the Secretary of the Interior.

otherwise result. It is recognized that the conduct of business before the Patent Office requires special qualifications and experience, and that the Patent Office Register of persons admitted to practice there contains the names of many reputable men of long and honorable practice, who are not members of the Bar. Therefore, such partnership as may now exist between members of the Bar and such Patent Office practitioners shall not be deemed a violation of this canon, nor shall the continuation of the use of existing firm names or titles which may include the names of such persons. Distinction should be made in connection with the use of such firm name or title between the qualifications of those members of the firm who are members of the Bar, and those who are not.

12. It is unprofessional for a member of the Bar, or a person admitted to practice before the Patent Office, in any manner to lend his services or the privilege he enjoys as such, to any corporation, or layman, or group of laymen, who solicit legal business from the public, or hold themselves out as equipped to perform, or to obtain the performance of, any legal service or any services requiring in their conduct a member of the Bar, or a person admitted to practice before the Patent Office.

Association with Disbarred Attorney

13. Professional association with any disbarred or discredited attorney in such a way as in any manner to avoid, relieve or abate the effect of his disbarment or discredit, or confer upon him any benefits or emoluments derived from such professional association, is condemned.

Enlisting the Services of Officials

14. It is unprofessional in any manner to use the name or solicit the services of any member of either House of Congress or of any other officer of the Government as an aid to procuring business or prosecuting cases, and clients should be discouraged from seeking such aid.

Ex-Officials of the Patent Office

15. It is unethical for any one, who has served in the Patent Office, to prosecute, directly or indirectly, applications having subject matter which to his knowledge will conflict with other unissued applications concerning which, during his employment in the Office, he has obtained confidential information.

Splitting Fees

16. When patent, trade-mark or copyright matters are referred to specialists in these fields by lawyers in general practice, there should be no division of the specialists' fees with the general practitioner.

PROBLEMS OF PROFESSIONAL ETHICS

III. The First Problem of Professional Ethics

By HENRY UPSON SIMS
Of the Birmingham, Ala., Bar

IF the acceptance of causes for clients and the practice of the legal profession by lawyers had its origin in the relation of patricians and clients in ancient Rome, as has been traced in an earlier section, then it is evident that the social principles involved in that ancient relation must underlie the system of ethics which has grown up around the practice of the law throughout history. But while the patrician protected and defended the client, it was only in a qualified sense that the patrician represented him. Being an important factor in the Roman government, the patrician owed his first duty to the state and he owed no duty to his client superior to that duty to the state. He sought in behalf of the client merely the client's rights under the law, and no more, and any other notion of his duty to the client based on his advocacy merely, is a gross misconception.

The patrician's duty to the state was the duty of a legislator of modern times. And no assumption of a duty to defend or to advance the interests of any client or dependent individual could qualify that primary duty. And, of course, no one would deny that position as far as a legislator is concerned. But is there any difference in the position of an attorney at law as regards his relation to his modern client? That is a question not infrequently presented.

When the institution of patrician and client first developed in early Rome, there was no very clear distinction between the legislator and the judge. The development of the functions of the praetors, or judges, came later. And so the relation of the patrician to the administration of law became somewhat different as time passed at Rome from what it was under the early republic. When the Roman Senate had developed, though the Senate was still almost entirely composed of patricians, the Roman praetor, though confirmed by the Senate, administered justice entirely apart from the Senate; and while the Patrician lawyer had a place, his place was in no sense a legislative position as that of the old patricians had been. Even if we ignore the fact, which we have seen established, that the lawyer was never allowed to contract for a fee for his services, we have seen that he was nevertheless retained and that he came to be paid for his efforts to procure for his clients the recognition of their claims.

Then it would seem to follow that the relation of attorney and client became merely a form of the relation of agent and principal; so that as soon as

the attorney began to receive pay for his services, he became in duty bound to seek for the client all that the client might claim and desire. The average client today would doubtless say that there is no limitation upon what the advocate should seek in his behalf; and some mature lawyers take that position, too, thereby making it exceedingly hard for the young advocate to decide what are his professional obligations.

But it is not difficult to show that such a position, without regard to the history of the profession, will lead us into that old form of fallacy called by the logicians a reductio ad absurdum, and that our legal ethics has a stronger basis than mere history for its support.

If the attorney owes the duty to his client to strive to obtain for him all that the courts can be persuaded to grant, it must be so on the theory that the acceptance of a fee imposes on the lawyer the duty of obedience without social responsibility, when the client is entelligent enough to direct him, and on the theory that the lawyer as a fiduciary, has no right to exercise discretion, but must seek the utmost when the client is not intelligent enough to direct him.

But no principal, whether intelligent and informed on legal matters or not, would turn his affairs over to an agent or attorney to act for him, unless he believed the agent or attorney to be worthy of the trust; and no person is trustworthy who does not hold the rights of others in as high regard as he holds the rights of himself. Otherwise a man would be justified in observing only such laws as he deems it to his interest to observe, so long as he can avoid punishment in doing so.

Therefore, if an attorney or advocate is expected to seek more for his client than the client is justly entitled to, the attorney is expected to seek more for his client than a trustworthy man would seek for himself,—a theory of which the practical realization is quite beyond human experience.

Hence it is said that a lawyer's obligations, though essentially fiduciary, require him to observe as strictly the laws for the protection of others as he insists upon the observance by others of the laws for the protection of his clients.

The fallacy of the notion that a lawyer can be trustworthy if he seeks to obtain for his clients more than they are entitled to under the recognized laws of the land, rests upon an assumption that by the artifices of his profession he can constantly or repeatedly mislead the courts in the interest of his clients, without losing his trustworthiness; in effect that he can be relied upon to steal from society for the benefit of his clients, without stealing from his clients for the benefit of himself. And yet the old legal maxim, "falsus in uno, falsus in omnibus," has been always regarded as reliably sound.

But it will be at once objected that if the attorney should not seek for his client more than the client is entitled to under the laws of the land, the client has no need of employing any attorney at all; as the court will endeavor to give every claimant all his dues under the law; and if not obstructed by procedure, could dispatch business with the speed of an ordinary arbitrator. This argument appealed to the French at the time of their revolution, and to the Russians at the beginning of the Soviet régime; when lawyers were abolished in both those countries.

But aside from the fact that lawyers came back with civilization in France, common law experience shows that beyond the simplest controversies of fact, and the most thoroughly established principles of law, no busy judge can proceed with certainty and confidence if unassisted by lawyers who have given both the law and the facts more or less extensive examination. Even where the courts are divided with a view to specialization by the several judges, so that the judge is prepared by experience in solving problems of the one or more general classes which are set before him, the court's adjudication without the aid of counsel rarely solves all the issues and uncertainties. In some jurisdictions, even in higher courts, such a situation is allowed to come about under the guise of submissions for the decision of the court without briefs or arguments; and every lawyer of long practice knows well enough not to risk such a submission if he has a case admitting of statement at all.

In short, whether from the standpoint of history, or on the foundation of logic, or with a view to social efficiency, the office of the counsellor and advocate is to aid the court in the discovery and application of justice in the causes in which he takes part. And as a corrollary thereto the first principle of professional ethics for the lawyer is to seek always the discovery and establishment of justice according to the recognized principles of the law; not to advocate what he believes to be illegal, nor to throw obstacles in the way of what he believes to be right and legal, and never to conceal what he knows to be the law.

If this primary principle of legal ethics were universally recognized and acted upon, a large percentage of litigated cases would be withdrawn from the court files, and many of the present problems of the administration of justice in America would be eliminated.

Court-Room Photographs

"The present day practice in reporting sensational law-suits in the public press is typified by the publication of photographs of court-room scenes. The attendant stories stress in like fashion those features which excite popular attention. This sating of the public appetite for the unusual not only brings the undesirable results incident to all scandal, but is peculiarly harmful in its effect upon the administration of justice. Thus we find the presentation of a trial in the light of a theatrical performance rather than a dispassionate inquiry into the merits of the case. This is bound to lessen respect for the law and its instrumentalities. Akin to this is the creation of an erroneous conception of the true working of the judicial machinery. Frequently there results the formulation of a public opinion upon a matter to be judged by the jury alone. And of course there is the catering to the public appetite for scandal, with the consequent detriment to the public welfare.

"It is believed that a co-ordinated effort on the part of the Press and the Bar will in time bring about the desired development in this important field of reporting."—*Chicago Bar Association Record.*

AN IMPENDING CALAMITY

By Harry Eugene Kelly
Of the Chicago, Illinois, Bar

THE United States Senate, during its last session, passed a bill declaring it to be "reversible error for the judge in any cause pending in any United States court to express his opinion as to the credibility of witnesses or the weight of the evidence," and also requiring the judge to "deliver his charge to the jury in writing at the conclusion of the evidence and before argument of counsel." This bill is now on the calendar of the House of Representatives, awaiting its consideration this session. Its enactment would be a calamity in the administration of justice by the federal courts.

It is not convenient to stop here to subject the phrases of this bill to exact interpretation. The question may be raised whether it does not prohibit a judge from summarizing the evidence for the jurors and acquainting them by analysis with the issues of fact raised on the evidence. There is danger that the bill might be interpreted to go that far. At least it prohibits the expression by the judge of his opinion as to the credibility of a witness or the weight of the evidence. It also necessitates the delivery of instructions by the judge *before* arguments by counsel, unless the practice in the state courts sitting in the particular jurisdiction is to the contrary. The effect of the bill would be to revolutionize present procedure in the federal courts.

The only person engaged in the conduct of a trial at once learned in the law, trained in examining and analyzing facts, experienced in estimating the value and weight of evidence and in ascertaining the credibility of the witnesses, and generally impartial in all of his contacts with the various phases of a trial, is the judge. He is charged with the duty of deciding questions of law. He has been educated for that purpose. He comes to the bench after experience in practicing law as a profession. From that practice he has not only become grounded in the law but experienced in weighing facts as evidence, determining their effect in trials, and in estimating the trustworthiness of witnesses. His elementary education respecting the functions of a judge and the impartiality of judicial conduct, his experience as a lawyer in conducting trials before courts, his oath to do equal justice to all litigants, and the weight of the tradition of his great office, combine to prepare him to be as completely impartial between litigants as it is possible for the human mind to be. It is his function to see that jurors hear only such facts as are material and pertinent to the trial of the issues, and that they are properly instructed in the law. The law gives him substantially unlimited power in the conduct of his court.

At common law the judge not only instructed jurors as to the law, but commented before them on the weight of the evidence, and expressed his opinion on the credibility of the witnesses. This common law rule has been enforced uniformly from the beginning in our federal courts. In most of the state courts it has been displaced by statutes, under which judges are prohibited from expressing their opinions to the jury on the credibility of witnesses or the weight of the evidence, and have become little more than presiding moderators over the jurors. But in the federal courts judges still remain the educated, experienced, impartial, wholesome advisors of jurors and the responsible directors of judicial administration.

The litigant always strives to win, not according to the rule of justice, but in spite of it. He believes himself actuated by a sufficient reason for seeking victory regardless of the law or the existence of adverse facts. He thinks that special conditions affecting his case permit rules of law and conditions of fact adverse to him to be ignored with impunity and without dishonor. He artificially creates a state of mind conceiving that ordinary rules of law and all facts adverse to him should be overlooked to permit the triumph of his will to win. He is never impartial. His judgment on the facts of his case and the decision that ought to be rendered in it is worthless. With the facts and the law of his case against him, he, nevertheless, clings to his unalterable conviction that some way ought to be found for him to win, and, upon losing, that the judge, or the jury, has been fraudulently turned against him.

The attorney is little more than the employed agent and partisan spokesman of the litigant. He does not represent his own views but the necessities of his client. When he comes into court with a case he has already been convinced, regardless of all deficiencies in it, that his client ought to win. If he cannot come to that conclusion, he does not take the case. It is his business to become convinced, and to stay convinced, that his client ought to win. If he is in court at all, he is there to protect his client against loss, and to promote his client's interests according to his client's necessities to the best of his abilities. He does not pretend to be impartial. He does not pretend to be seeking justice in the abstract. He stands for his client's concrete contentions, and gives them all the force possible. If he should find in the course of the trial that his client is wrong, he would not be free to say as much to the judge or the jury. He might find it impossible even to withdraw from the case under such circumstances, though lawyers have probably been permitted by the court to do so under such circumstances; but if he remains in the case, as he commonly has to, under the high pressure of his obligation to his client he would not be able to expose to the judge or the jury the irreparable weakness of his client's cause.

So much for the litigant and his attorney. It is apparent not only that little reliance can be placed upon either of them for impartial assistance to jurors, but that either of them may see jurors misled and victimized by false testimony and by specious arguments.

The chief value of jurors in the trial of a case is their impartiality. They are believed by the people to be our best assurance of impartiality in the trial of issues of fact. Therefore, the jury system is imbedded in our jurisprudence beyond the present prospect of its dislodgement; not that it is believed to be perfect, for it is manifestly assailable on many grounds, and its imperfections are numerous, but because it is a system of trial by which judges of facts are selected at the last moment before the trial from the multitude of the people, unknown beforehand and, therefore, likely to be inaccessible to previous corruption. Suggestions to substitute the judges for trial of facts, their identity to be known, therefore, before the case is called, have not

been acceptable. Jurors perform their service in a particular trial and then dissolve into the multitude again.

But the probable impartiality of jurors is almost the only virtue of the jury system. Jurors are always ignorant of the law. They are allowed to have knowledge of only such facts of the transaction involved as are presented to them narrowly under the restrictive rules of evidence and many prejudicial circumstances. A judge trying an equity case is allowed more complete access to the facts of the case than are jurors in law cases, because he is able to ignore irrelevant and immaterial facts, while jurors are known to possess no such ability. The law itself thus emphasizes the superiority of the judge over the jurors.

Jurors rarely understand all of the evidence presented. They are likely to comprehend it in detached parts, and, therefore, to give undue weight to such parts. They do not comprehend it as a whole. They are not trained to listen attentively to continuous narrative, or to examine documentary matter critically, or to retain long in the memory a multitude of facts presented to them in the distracting course of a trial. Nor have they had experience in analyzing situations of fact, or in estimating the weight to be given to some facts in comparison with others.

Much less have jurors had experience in estimating the probable truthfulness of witnesses. Much ingenuity is devoted to presenting witnesses deceptively in their most fascinating guise. Not even the most critical and analytical mind is able to estimate correctly the trustworthiness of every schooled and adroitly prepared witness, but all jurors are obviously far less able to do so than the average judge.

To estimate the value of evidence and the credibility of witnesses requires the highest kind of critical acumen, and the finding of the facts is the most difficult part of a law suit. To do these things satisfactorily requires special education and experience. No juror has had such preparation; but nearly every judge has had it.

Under such circumstances a juror is helped by a clear, concrete statement of the judge's impressions, by an opinion from his impartial mind, out of the fullness of his expert knowledge and special experience, on the relations of the facts adduced, on their several parts in the narrative presented, and generally on the weight of the evidence and the probable credibility of the witnesses, *after* arguments of counsel have been made and all of the partisan influence has been exerted.

In the federal courts, under the present practice, jurors have the benefit of such assistance at that point in every law trial. They are not bound to follow the judge's opinion, and they are so informed by the judge; and they often ignore the judge's opinion and return a verdict on the basis of a different one, and thus show their freedom from domination by the judge in reaching verdicts. The judge rarely expresses an opinion as to what the verdict should be, but when he does his opinion is only that of a thirteenth juror, offered as helpful assistance from a trained and impartial mind, to be given only such weight by the jurors as in their opinion it may merit.

What reason can there be for closing the mouth of the only learned, experienced and impartial person officially engaged in a trial? Why allow litigants to misrepresent the facts, and their attorneys to make misleading arguments to jurors, in favor of these litigants, and compel inexperienced, untrained jurors to try to analyze a mass of contrary, partisan statements of fact and skilfully devised, misleading arguments by overzealous attorneys, without assistance from a judge who is able to explain to them the issues correctly and impartially with reference to the particular testimony of each witness, to call their attention to the matters of particular moment in the evidence, and to speak a word of caution, when necessary, about parts of the testimony or certain of the witnesses?

Why not permit the judge to acquaint the jurors with the *real* situation before them, and thus enable them to decide the case with as much acquaintance with the actual issues and facts of it as possible? A law suit is not a game among litigants and their attorneys; it is an inquiry by the sovereign government for the purpose of administering substantial justice to the litigants. It has been devised to ascertain the truth. Why not conduct it so that it will accomplish that purpose?

The proposed bill undertakes to deprive jurors of much of the help that a judge can extend them. The best thing that a judge can do to help a juror is to analyze and summarize the facts, explain their relationship, give a critical word of caution about the credibility of a crooked witness of particular importance, and express his expert opinion in an occasional case as to the wisdom of a verdict one way or the other. If the judge be not permitted to do these things, he becomes little more than the spectator of a mob.

Jurors welcome such service from a judge. Probably no juror ever objected to it. Why should not the juror's opinion of it be accepted as the proper estimate of it?

The common law rule, by which a judge renders such service to jurors in the federal courts, was abandoned by most of our States many years ago as the result of a bid by jury lawyers for popular favor or the false representation that judges were using autocratic power. There was no such autocratic power, because jurors were not required to take the opinion of the judge, and were free, and were informed by the judge that they were free, to ignore his opinion.

Lawyers seeking personal power over jurors, and trying to make out of a law suit a game of wits between attorneys, procured the abandonment of the common law rule in the state courts, with the result that in these courts witnesses and lawyers now have special facilities for deluding jurors in the game of making the worse appear the better reason. In these courts jurors are required, without helpful assistance from any impartial agency, to defeat set-up cases, detect perjured witnesses, and perceive specious arguments and misrepresentations of law and facts by those attorneys who have no respect for themselves and no regard for justice.

In such courts the honest litigant and the honest lawyer, trying their case according to the rules of decency, are by their very virtues put at a disadvantage which they are not able to overcome against the unrestrained use of the arts of deception and chicane by conscienceless opponents.

Under such a system lawyers who are willing to turn a jury trial into a riot are invincible. Their unrestrained appeal to ignorant prejudices and emotions often overcomes justice. Such lawyers desire to keep jurors as much under their personal influences as possible, and as free as possible from any possibility of impartial enlightenment about the real facts and issues of a case. They have had their ignoble day, and are still having it, in those courts in which the judges have been thus cast out. But they have had short shrift in the federal courts, where jurors, under the intelligent and impartial suggestions of the judges, have been able to acquire exact knowledge of cases.

LETTERS OF INTEREST TO THE PROFESSION

The Proper Administration of Justice

SEATTLE, WASH., Nov. 1.—To the Editor: The lawyers who were sufficiently fortunate to attend the session of the American Bar Association held in London, and who visited England for the first time, returned to this country with much comment and explanation, I imagine, to their families, friends, clients, and possibly to some of the organizations to which they belong, about the many contrasts which they found in England as compared to the United States of America, and especially with respect to the administration of justice.

As they became afflicted with "busitis," as nearly everybody does who rides upon London's buses, or hastened about in taxicabs, they probably observed everywhere on the crowded thoroughfares, and in the congested districts, a desire on the part of everybody ahead to aid them in traversing the streets, rather than to impede them. There was no jockeying for position, nor such extreme haste as is manifested here; but every driver of a car ahead of you, whether is be a bus, a Rolls-Royce, or even one of the cheapest of the cheap cars, gave you a signal when and how to proceed.

The raising of a bobby's baton is more respected than all of our automatic or handworked crossing signals, and it gives you the very first impression, and a most lasting one, of the majesty of the law and how it is respected in England.

Court procedure will be found very different from that entertained in our country. There are no unnecessary delays, no red tape to be unwound, but direct action in every one of the courts.

Let me illustrate the effectiveness and the speed of the English judicial system.

Some of your readers will recall the trial of Major Armstrong, who was arrested for poisoning his wife. He was tried within a few weeks after being charged with the offense, his appeal to the appellate court was heard within a few weeks thereafter, and immediately upon the conclusion of the hearing on appeal the court rendered its decision, and again within a few days thereafter the appeal which had been taken to the House of Lords was dismissed, the decision of the appellate court affirmed, the sentence of the lower court carried out, and he was executed within three months from the time of the discovery of his crime.

It was my privilege to be present during a portion of the trial of Horatio Bottomley, then a member of the House of Parliament, and one of the most prominent men in England. In fact, he was so much in the public eye that among the wax figures in Mme Tussaud's gallery he was exhibited as one of England's notables.

He was accused of defrauding a large number of people out of very large sums of money during the war. He was tried, convicted, and an appeal heard, all within less than two months, and he is now serving his term in state's prison, and I might add, parenthetically, that the statue has been removed from among the notables into the cellar, where there are replicas of prominent criminals.

Bottomley was his own counsel, and he had the reputation of being an exceedingly shrewd one. The court allowed him a tremendous amount of latitude, gave him every possible consideration, but did not hesitate to render an opinion from the bench as to whether or not statements which the distinguished defendant made ought to be believed by the jury.

Still another case will illustrate the point which I am about to make.

The murderers of Sir Henry Wilson were tried, convicted and executed within a month of the commission of the crime, and in not a single one of the cases above referred to, nor in many others that I might name, was there ever a claim made that there was any miscarriage of justice or that the defendants did not have a perfectly full and fair opportunity to present their defenses.

What struck me as particularly startling was the fact that the lawyers made very few objections to the introduction of evidence, and never interrupted the court when he was examining witnesses with a view of ascertaining where the truth might be.

Unfortunately, in this country constitutional provisions or statutes in some of the states prevent the court from commenting upon the evidence, and many a hairline decision has been rendered, undoing the work of months of toil and trouble in the courts, by reason of what the court seemed to think was a possible comment upon the evidence.

Another thing that struck me most forcibly was the failure to object to evidence, even though it appeared to be hearsay. In other words, there was no attempt to keep from the jury any fact or circumstance which might in any manner or form throw any light upon the issue involved, and this certainly is one of the most striking contrasts to our own mode of court procedure.

Another contrast that appealed to me mightily was the absolute confidence which the English lawyers have in the integrity and ability of their courts. While being entertained by one of the leading practitioners in London, a description of whose office really requires a separate article, for it occupied four stories of a ramshackle and disreputable looking building not unlike those occupied by the leading members of the bar in England, he informed me that although he had been in active practice for twenty-five years, with a very large staff of assistants, he had taken scarcely any appeals in cases heard by the trial court, and never had taken an appeal to the House of Lords, and the reason he gave was that they were usually satisfied that they had a fair and impartial trial, and with the decisions of their upright judges.

It must not be forgotten that in England the judges are extremely well paid, are appointed for life, or during good behavior, and that they are frequently promoted when the excellence of their service seems to warrant. There is no incentive to cater to any special group, either of politicians or of interests which might aid them in an election, and therefore a judge is entirely removed from the temptations which surround our judiciary, other than the Federal.

Another surprise which awaited me was the manner in which juries are selected. In our country it sometimes takes days, and even weeks are consumed in the selection of a jury in an important case, while in England a jury is selected in a few minutes. The only question that the presiding judge himself asks of the

talesmen is whether or not they can read and write the English language.

The English courts are much more impressive than ours, for there is much greater decorum, and when this is augmented by the wearing of wig and gown, and a very deferential manner towards court and counsel, we find the answer to the question as to why the people of England respect the law.

In our own country we have altogether too much circumlocution, too many dilatory motions and pleas are permitted, too many adjournments and technicalities are indulged in, and they are all expensive for the taxpayer, and unsatisfactory to the litigant.

In the Oriental countries and in France, where they apparently proceed much more leisurely than in our country, I have seen cases disposed of with much greater dispatch than obtains with us, and between the searching questioning of the court, aided rather than retarded by the lawyers, the truth has been elicited and a speedy result has followed.

In our country we are chiefly concerned in keeping the truth from court or jury, and in delaying the final outcome. It's about time we put ourselves in reverse and went the other way.

Many litigants are deprived of the right to appeal because of the delay and expense involved, while in England the most important cases are heard upon the typewritten record as made in the lower court, and are promptly decided and oral opinions rendered.

In our country case law has become so much the habit that it is almost a disease. The most technical sort of distinctions are attempted to be drawn between cases, while established principles are lost sight of.

Bar associations, unfortunately, have lost their influence as a guide to public opinion. No matter how much they recommend to Congress or legislatures, their suggestions are either entirely ignored or overruled. The only way the public can be made to take notice of the defects in our judicial system and mode of procedure, is to show the excessive taxation which results. The cost of litigation, the expense incident to criminal and civil trials, is away beyond what it should be, and if the taxpayers would only remember that they are paying the bills, perhaps some reformations could be initiated and progress to fruition.

SAMUEL R. STERN.

The Child Labor Amendment

New York, Dec. 10.—To the Editor: So many inquiries have been made in regard to the statement by Secretary Davis which was referred to in my article published in your October number that I am sure your readers will be interested to know the exact quotation and the occasion of the address. It was contained in his address on Labor Day before the Central Trades and Labor Council of Greater New York at Fort Hamilton, New York City, and is as follows:

"The Federal Congress has passed, and President Coolidge has signed a constitutional amendment authorizing federal legislation to control the labor of children. It is now before the states for ratification, and I am confident that it will be ratified. It will enable us to take out of competition with the American adult worker about one million of our rising generation who ought to be in our schools."

EVERETT P. WHEELER.

Massachusetts Bar Association Holds Annual Meeting

The annual meeting of the Massachusetts Bar Association was held in Boston on Thursday, November 20. After the reports of committees, there was an informal discussion of the subject of "Advertising by Banks and Trust Companies for Legal Business." Thereafter, it was voted that a committee be appointed to consider the subject.

The report of the Executive Committee recommended support of the pending bill for the increase of salaries of the Federal judiciary, and the association approved it without dissent.

After the business meeting, the members participated in a "Bench and Bar" dinner of the Bar Association of the City of Boston at the new Chamber of Commerce Building, at the corner of Federal Street and Franklin Street. The place of the meeting was one of peculiar historical interest as the building of the Chamber of Commerce stands on the site of the old Federal Street Church, in which the Constitution of the United States was debated and ratified in 1788 by the Massachusetts Convention. A special number of the Bar Bulletin calling attention to these and other interesting historical facts was placed at each plate at the dinner.

George R. Nutter, Esq., President of the Bar Association of the City of Boston, presided and brief addresses were made by Chief Justice Rugg, Thomas W. Proctor, Esq., the retiring President of the Massachusetts Bar Association, and Hon. William Caleb Loring, a former justice of the Supreme Judicial Court and chairman of the newly created Judicial Council of Massachusetts.

After the speaking, a collection of scenes and portraits from the legal history of Massachusetts were thrown upon the screen, followed by the photoplay, "The Declaration of Independence," as produced by the Yale University Press and distributed by the Pathé Exchange, Inc.

The following officers were elected at the regular meeting for 1924-25:

President, George L. Mayberry, of Waltham; Vice-Presidents, Frederic Dodge, of Belmont, and William Caleb Loring, of Boston; Secretary, Frank W. Grinnell, Boston; Treasurer, John W. Mason, Northampton; Members of the Executive Committee: Horace E. Allen, Springfield; Arthur W. Blakemore, Newton; Harold S. R. Buffington, Fall River; Francis Burke, Boston; Frederick H. Chase, Milton; Edward T. Esty, Worcester; Francis P. Garland, Boston; Bert E. Holland, Boston; Edward A. MacMaster, Bridgewater; Frederick W. Mansfield, Boston; Philip Nichols, Boston; Edwin G. Norman, Worcester; Robert C. Parker, Westfield; Felix Rackemann, Milton; James M. Rosenthal, Pittsfield; William R. Sears, Boston; Homer Sherman, Charlemont; Fitz-Henry Smith, Boston; James W. Sullivan, Lynn; Michael A. Sullivan, Lawrence; Frederick N. Wier, Lowell. The President, the Retiring President, the Secretary and the Treasurer are members of the Executive Committee, *Ex Officio*.